91-443

No.

In The

Supreme Court of the United States

October Term, 1990

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKE SHORE HOSPITAL, INC., STAT SERVICES, INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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64 Marine Drive
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(716) 691-3300

August 10, 1991

QUESTIONS PRESENTED

1. Whether racially motivated ***discriminatory intent*** by the Respondents ***Lake Shore Hospital et al.***, to deprive Petitioner, Daniel Hodge of a constitutionally protected intellectual property interest in his board-granted privilege to practice medicine can be proved by documentary evidence?

2. Whether the Respondents ***Lake Shore Hospital et al.***, in removing the Petitioner, Daniel Hodge - without **Procedural and Substantive Due Process** - from the Lake Shore Hospital Emergency Room physician's roster, contrary to the directive of its board, documentarily violated its bylaws and federal anti-discrimination, right-to-contract and conspiracy statutes?

3. Whether the district court in becoming a self-appointed **"medical expert"** for the Respondents and in making spurious procedural distinctions between **"admissions,"** and in leaving a judgment open for almost three (3) years, merely to determine **"punitive attorney's fees"** against Petitioner, Daniel Hodge, and the circuit court's sanctioning of such conduct as allegedly being valid and **"interlocutory"** and the circuit court's sedulous evasion of jurisdictionally proper issues presented to it for resolution, was so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision?

4. Whether policing of circuit courts should be done by a National Court, which can issue final binding decisions, and which could prevent this assortment of interminable injustice, even if certiorari review, having the usual precedential value, were not warranted?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

United States Constitution and Laws

Federal Rules of Civil Procedure (F.R.C.P.)

Page

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Petitioner prays that a writ of certiorari be issued to review an order of the United States court of appeals for the second circuit filed on May 15, 1991, which affirmed the December 21, 1990 Judgment, the December 19, 1990 **"final order"** and the **"interlocutory orders"** of February 4, 1988 and February 17, 1988 on which the judgment was based in ***Daniel R. Hodge, M.D. vs. Lake Shore Hospital Inc., et al.***, case # CIV-87-566C. The district court had withheld entry of judgment for almost 3 years purportedly to determine attorney's fees.

OPINIONS BELOW

The Summary Order, Docket # 91 - 7063, of the United States court of appeals for the second circuit, filed May 15, 1991, is unpublished, and is reprinted in the Appendix to this Petition, **(AP 1-2),**[1] infra. The December 21, 1991 Judgment (AP 3),

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[1] **"AP"** denotes the appendix attached to this Petition.

December 19, 1991 Decision and Order (AP 4-6) and the **"interlocutory orders"** of February 4, 1988 (AP 9-16) and February 17, 1988 (AP 17) of the United States district court for the western district of New York, case # CIV-87-566C, are unreported.

JURISDICTION

The Judgment of the Court of Appeals in ***Daniel R. Hodge, M.D. vs. Lake Shore Hospital Inc., et al.,*** was filed on May 15, 1991. This Court has jurisdiction to review that Judgment under 28 U.S.C. 1254 (1), Rule 10.1 and 13 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Are all set forth in pertinent part beginning at (AP 18-20)

STATEMENT OF THE CASE

On June 5, 1987 Petitioner, Daniel Hodge filed a suit in Federal district court **(A 5-37),**[2] for the western district of New York, against Respondent, Lake Shore Hospital after the hospital administrator Respondent, James B. Foster, C.E.O., and the previous year's (1986) Emergency Room Committee Chairman, Respondent, Joseph G. Cardamone, M.D., and the private Emergency Room physician service contractor, Respondent, Lynn Feldman, D.O., refused to comply with the wishes of the Lake Shore Hospital Board, (A 132-135) which had re-appointed Petitioner, Daniel Hodge to the hospital Medical and Emergency Room staff for 1987 and 1988.

The **Complaint** and **Affidavit** (A 5-37) with particularity, asserted in well-honed, precisional averments of and from a wide nucleus of operative facts, esoteric and arcane medical data and based on documentary evidence, that the Respondents unlawfully

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[2] The number(s) in the parentheses following the letter **"A"** refer(s) to the page(s) where the proof is found, in the **Appendix for the Appellant**, in the court below.

and pretextually denied Petitioner, Daniel Hodge the right to contract his services as an Emergency Room physician in violation of 42 U.S.C. 1981 and in violation of Lake Shore Hospital bylaws, in a racist conspiracy, fulminatingly operating within and outside of the Lake Shore Hospital, in violation of 42 U.S.C. 1985 and 1986, and that the Respondents defamed the personal and professional reputation of Petitioner, Daniel Hodge, within and outside of Lake Shore Hospital, by making fraudulent and pseudo-scientific medical assessments of his professional performance, and causing Plaintiff-Appellant to suffer a loss of income and extreme emotional distress.

Respondent, James B. Foster, C.E.O., moved to dismiss (A 38-53) pursuant to F.R.C.P. Rule 12 (b)(6), Respondent, Joseph G. Cardamone, M.D., moved (A 54-83) for partial Summary Judgment pursuant to F.R.C.P. Rule 56 and to dismiss the Complaint in its entirety pursuant to F.R.C.P. Rule 12 (b)(6), as did Respondent, Lynn Feldman, D.O., who relied in part on the reply submission of Respondent, James B. Foster, C.E.O. The Respondents then proclaimed that **"defendants presume that the factual allegations in the Complaint are true,"** admissions that were made **"pursuant to their F.R.C.P. Rule 12 (b)(6) motion to dismiss."** Based upon those vigorously proclaimed admissions and grounds, Petitioner, Daniel Hodge then cross-moved (A 84-161) for Summary Judgment pursuant to F.R.C.P. Rule 56.

On February 4, 1988, federal district court Judge John T. Curtin, who is not a physician, and without the benefit of **"medical expert"** opinion proclaimed that, **"As described by the plaintiff himself, all of these disputes clearly originate from *serious differences* about proper medical treatment,"** dismissed the suit (AP 13) and awarded the Respondents sanctions against the Petitioner, Daniel Hodge pursuant to F.R.C.P. Rule 11, allegedly because Petitioner committed the unpardonable sin of equating operative factual admissions under F.R.C.P. Rule 12 (b)(6) and Rule 36 as being one and the same.

In a February 17, 1988, sua sponte, post-decision Order (AP 17), Federal district court Judge John T. Curtin proclaimed,

"The Court will withhold entry of judgment until after the question of attorney's fees is decided. If *any party believes that*

judgment shall be entered earlier, **the Court shall be notified with the reasons for such entry."** (emphasis supplied)

Thereupon, Petitioner, Daniel Hodge filed a **Notice of Appeal** (A 242) on February 19, 1988 and on March 2, 1988, submitted an Affidavit (A 244-264) specifying urgently why, as the Court had requested, **"the reasons for such entry,"** were being required by the Plaintiff-Appellant in an early and most expeditious fashion, predicated on the propositions and grounds depicted in an Affidavit entitled in a most graphically descriptive way, as,

"Plaintiff's Affidavit in Support of Immediate Judgment, Further Severe Penalties and Fines Against the Plaintiff and for Even More Magnanimous Fees for the White Racist Defendants and Their Counsels and that the Court Then Recuse Itself Due to Its Conflict of Interest as Self-Appointed Medical Expert for the Defendants." (emphasis supplied)

On April 20, 1988, the then-Chief-Judge, Wilfred Feinberg of the second circuit and, Judges Thomas J. Meskill and Lawrence W. Pierce, granted the Respondent Feldman's motion to dismiss the Appeal (AP 7-8) as being **"premature"** even in light of such seminal cases as ***Gillespie vs. United States Steel,*** 379 U.S. 148 (1964) [which held that a **final decision** does not necessarily mean the last order possible to be made in the case, but rather is a practical decision arrived at by a balancing of competing interests] and ***Sears, Roebuck & Co. vs. Mackey*** 351 U.S. 427 (1956), [express determination that there is no just reason for delay] to [direct the entry of a final judgment as to one or more but fewer than all of the claims of the parties] and ***Cohen vs. Beneficial Industrial Loan Corp*** 337 U.S. 541 (1949) [that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, ***too important*** to be denied review and ***too independent*** of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated]

The ***Hodge vs. Lake Shore Hospital Inc., et al,*** dismissal

Judgment was kept unentered, solely to determine **attorneys fees,**[3] for almost three years, as a reasonably connected **"balancing of interests"** or was it kept unentered for some other purpose, like to prevent appeal altogether, banking of course, on the Petitioner, Daniel Hodge, giving up?

On December 19, 1990, a **"final order"** was made and on December 21, 1990, Judgment was entered, with no mention by Judge Curtin or with no explanation by him of any kind whatsoever, of what had actually accounted for the lengthy **"procedural interlocutory delay"** and even then, what legal, social, economic, or scientific, most enigmatic and serendipitous event attended and had provoked, prompted, incited and suddenly compelled Judge Curtin, almost three years into the **"withheld entry of judgment,"** era, to finally have it entered, and most certainly not - in accordance with F.R.C.P. Rule 1, that **"just, speedy and inexpensive determination of every action,"** Rule. Petitioner, Daniel Hodge promptly re-Appealed that December 19, 1990, ***Hodge vs. Lake Shore Hospital Inc., et al.***, Decision, Order and Judgment on January 4, 1991.

The Petitioner, Daniel Hodge, under the guise of F.R.C.P. Rule 11, was fined **$ 2000** for fearlessly fighting corruption and white-collar criminality.

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[3] Edward W. Keane, Esq., in Chapter 26 of the New York State Bar Associations, Federal Civil Practice, entitled Appellate Review, states the following with regard to **"Final"** Decisions:

[D]etermining **whether** and **when** a final judgment has been entered usually presents little difficulty. In a few circumstances, however, a judgment may be **"final"** and appealable even though potentially significant rulings have yet to be made, such as taxing costs, F.R.C.P. 58, awarding attorneys' fees, ***Budinich vs. Becton Dickinson & Co.,*** 108 S. Ct. 1717 (1988), and determining the details of antitrust divestiture, ***Brown Shoe Co. vs. Unites States,*** 370 U.S. 294, 308-309 (1962). The guiding principle is that **"a question remaining to be decided after an order ending the litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."** ***Budinich vs. Becton Dickinson & Co.,*** 108 S. Ct. at 1720.

The fact situation in ***Hodge vs. Lake Shore Hospital Inc.,*** is startlingly similar to ***Budinich,*** and most surely even falls well within the mélange - and in fact, doesn't even rise to the compelling levels of intensity - of such venerable procedural powerhouses of **"finality"** as ***Cohen, Sears,*** and ***Gillespie.***

The other pernicious consequence of the delayed and thus denied **Justice,** in the nearly three-year-long unentered judgment, is that during the intervening **"dormant"** period, the under color of law, conspiratorial and collusive New York State department of health's, office of professional medical conduct **(OPMC)**[4] and private white-collar, covert activity, deception, misrepresentation, tampering with medical records, and pseudo-scientific fraud, being committed by the Respondents in conjunction with their attorneys and the New York State department of health, and which continues unabated, therefore, converted the court of appeals for the second circuit into a **nisi prius forum,** to hear additional and superfluous matters for the first time - supplying more evidence of the intensity and extensiveness of damages to the Petitioner and the documented increasing culpability of the Respondents - that could not by definition be considered in the district court, because the action had taken on a rather unusual design **"in hibernation"** during that procedural hiatal unappealable status of being **"in between district and circuit court,"** for almost three years.

On May 15, 1991, United States court of appeals for the second circuit Judges, George C. Pratt, Roger J. Miner and Frank

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[4] The **"positive scientific proof"** purported precedential value and preclusive Res Judicata affect on the validity of Petitioner's claim of racial discrimination, conspiracy, and failing to stop a conspiracy to deprive a citizen of a constitutional right - whether or not certiorari is granted - is most cogent in this case. In Petitioner's Article 78 Proceeding, (prohibition, mandamus, certiorari action to review the official conduct of **"body or public officers and aggregations of person"**) in the New York State supreme court, appellate division, third department, in Albany, N.Y., - and denied review before the State of New York court of appeals, and on its way to this Court - New York State attorney general, Robert Abrams, in a Brief for the Respondents, in ***Hodge vs. New York State Department of Education et al,*** prepared by assistant attorney general John J. O'Grady, Esq., advanced the **preclusive defense,** stating that, **"Petitioner's further claims of racial discrimination and conspiracy were properly rejected be the Respondents where, as here, not only are the charges lacking any factual basis, the Federal courts dismissed similar claims. *Hodge vs. Lake Shore Hospital et al.,* 87 Civ. 566 C (W.D.N.Y. Feb 4, 1988) (Curtin, J.); *Hodge vs. Kelly et al.,* 86 Civ. 160 C (W.D.N.Y. July 8, 1988) (Curtin, J.), aff'd 868 F. 2d 1267 (2d Cir. 1988) cert. den. 490 U.S. 1081, 104 L. Ed 2d 663 (1989)."**

X. Altimari, while pretending during oral argument to be, oh so objective (AP 26-34), nevertheless, affirmed the December 21, 1990 Judgment and the so-called **"interlocutory orders"** of February 4, 1988 and February 17, 1988 - allegedly held open and the Judgment kept unentered for almost three years solely to determine a **"punitive F.R.C.P. Rule 11,"** $ 2000 in attorney's fees - and said they, **"on which the final judgment was based in part,"** most casually in the unusual procedural course of Justice. And moreover, these second circuit appeals court Judges proffered as justification for their and the district court's extreme departure from the usual course of judicial proceedings in the federal court system, in not protecting the Petitioner's constitutional, intellectual property, hospital privileges and contract rights, even after such blatantly obvious, documentary racial discrimination in violation of 42 U.S.C. 1981, that, **"Plaintiff's state claims were *not specifically developed* in the district court, are not part of the action, and therefore are not before us."** (AP 2)

Petitioner, Daniel R. Hodge, M.D., J.D., is a 47 year-old Black physician, licensed to practice medicine in New York State since 1978, who worked as a clinical physician at Attica Prison, in Wyoming, New York and as a locum tenens Emergency Room physician at various hospitals in the western New York area, including Respondent Lake Shore Hospital, and who completed Law School in August of 1988.

Beginning in early 1987, Petitioner, Daniel Hodge was abruptly dropped from the Emergency Room physician's roster at Respondent Lake Shore Hospital, in Irving, New York.

The president of the Lake Shore Hospital board of directors, Russell Newman, had written to the Petitioner on January 12, 1987, (A 135) announcing that on December 23, 1986, (A 134) Delmar Brinkman chairman of the board, had renewed the Petitioner, Daniel Hodge's Emergency department privileges. The letter stated in part,

"Your participation during 1985 and 1986 in the activities of the Medical Staff has contributed greatly to the success of Lake Shore Hospital. On behalf of the Board of Directors, I wish to thank you and to inform you that the Board has approved

your reappointment to the Medical Staff for 1987 and 1988 on the Emergency Services Staff.

Privileges are granted as specified in the delineation form which is attached for your information." [5]

Respondent Lake Shore Hospital's bylaws embodied principles of **Procedural Fair Process** to which all those professionally competent physicians continuously meeting the hospital's qualifications, standards and requirements, and having the privilege of membership on the medical staff (A 189-200) are entitled. Article VII, section 1(b) (A 190) of the Lake Shore Hospital bylaws, most specifically provides that,

"Whenever the corrective action could be a reduction or suspension of clinical privileges, the medical executive committee shall immediately appoint an ad hoc committee to investigate the matter."

In Article VII, section 1(c) the Lake Shore Hospital bylaws further most articulately provide that,

"Within ten (10) days after the receipt of the request for corrective action, the ad hoc committee shall make a report of its investigation to the medical executive committee. Prior to the making of such report, the physician against whom corrective action has been requested, shall have an opportunity for interview, he shall be informed of the general nature of the charges against him, and shall be invited to discuss, explain or refute them. This interview shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these bylaws with respect to hearings shall apply thereto. A record of such interview shall be made by the ad hoc committee and included with its report to the medical executive

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[5] On the **delineation of privileges form,** which specified various medical and surgical skills that the grantee physician, Dr. Hodge, was granted privileges to perform at Lake Shore Hospital, the Chairman of the Board, Delmar Brinkman, had signed twice, respectively above the dates 9-7-84 and 12-23-86, signifying that those delineated privileges, and constitutionally protected **Intellectual Property,** were renewed by the grantor, Lake Shore Hospital on those two dates and occasions. Of particular importance in this action were Petitioner Dr. Hodge's delineation of privileges in the following areas:

Surgery:	Skin & subcutaneous tissue, Repair of minor lacerations, Uncomplicated deep wound closure.
Anesthesia:	Local infiltration, Regional block, simple.
Internal Medicine:	Placement of vena caval catheter **[also known as insertion of a Central Venous Pressure (CVP) line].**

committee."

No where in any part of any record in the hospital or in this proceeding is there to be found **"an ad hoc committee report of a corrective action interview,"** nor nowhere in any record anywhere is there evidence that the medical executive committee of Lake Shore Hospital appointed an ad hoc committee to conduct a preliminary interview with Petitioner, Daniel Hodge. No where! In fact, Respondent James B. Foster (A 166-168) in his **Affidavit in Opposition** to the Petitioner's **Cross-Motion for Summary Judgment,** sworn to on September 10th, 1987, in paragraph 5, sheds much light on the subject of **"an ad hoc committee report of a corrective action interview,"** because Mr. Foster blandly admits, among other things, that there was none as he proclaims,

"The hospital's bylaws provide for a 'hearing' and 'due process' protections when 'corrective action' has been requested, privileges restricted or membership on the medical staff affected. (Articles VII and VIII). No 'corrective action' has been requested, privileges restricted or membership on the medical staff affected by the hospital regarding Dr. Hodge, and therefore, Dr. Hodge was not entitled to the 'due process' protections of the hospital bylaws."

But that **"official proclamation,"** although inaccurately characterizing Dr. Hodge as not being, **"entitled to the 'due process' protections of the hospital bylaws,"** which clearly every member of the medical staff is **"entitled"** to, although they may never need to utilize that **"entitlement,"** the Foster **"official proclamation,"** also did not comport with the reality of the stark documentary evidence (A 161) that Lake Shore Hospital Emergency Room physician's roster revised on January 13, 1987, revealed that the name of Petitioner, Daniel Hodge was dropped, only one day after the Lake Shore Hospital board of directors, in its January 12, 1987 letter, announced and concluded that Dr. Hodge had, **"contributed *greatly to the success* of Lake Shore Hospital,"** (A 135) and showed its thankfulness and appreciation for Dr. Hodge's **great contribution** and heartily reappointed Dr. Hodge to the Medical and Emergency services staff for not only 1987, but for 1988 as well.

And Respondent, James B. Foster's **Summary Judgment**

quality re-admission in paragraph 7 (A 167) of his **Affidavit in Opposition** to the Petitioner's **Cross-Motion for Summary Judgment,** sworn to on September 10th, 1987, Mr. Foster again reveals the reason that the Petitioner, Daniel Hodge was dropped from the Lake Shore Hospital Emergency Room physician's roster, because,

"As Dr. Hodge points out through his Complaint, Affidavit and Memorandum of Law, he was involved in substantial controversy with Defendants because of his manner of treatment, not because of his race. For example, at page eight of his own Memorandum of Law, he states that the treatment of the various patients described in his papers, 'figured heavily . . . in the Defendants' decision to drop the Plaintiff."

In paragraph 5 - **"No we didn't restrict or deny membership,"** - then in paragraph 7 - **"We dropped him, but not because of race, but because of how he treated patients."** The operative fact is that Petitioner, Daniel Hodge was dropped. The proffered reasons for dropping him were wholly irrelevant and immaterial to the ultimate issue of being dropped without either **"Procedural or Substantive Due Process,"** because regardless of whatever those reasons might have been, the hospital bylaws mandate in Article VII, section 1(c) that,

"the physician against whom corrective action has been requested, shall have an opportunity for interview, he shall be informed of the general nature of the charges against him, and shall be invited to discuss, explain or refute them."

The Lake Shore Hospital executive committee, on December 31, 1985 had imposed co-management **temporary restrictions** on a white physician, the President of the Lake Shore Hospital Medical and Emergency staff, Dr. D. Douglas Gilbert, D.O.'s privilege to admit patients to the Intensive Care Unit (ICU), with which he even then refused to comply. On April 4, 1986 the **ICU committee** made a decision to **completely suspend** Dr. D. Douglas Gilbert, D.O.'s privilege to admit patients to the Intensive Care Unit (ICU). On April 30, 1986 the Lake Shore Hospital **board of directors** ordered a **temporary suspension** of Dr. D. Douglas Gilbert, D.O.'s privilege to perform the, **"insertion of central venous pressure (CVP) lines,"** and continued the Intensive Care Unit (ICU) **admission suspension,** and required

that **all** of Dr. D. Douglas Gilbert, D.O.'s admissions to the Lake Shore Hospital must be sponsored.

Those **restrictions** and **suspensions** of the privileges of Dr. D. Douglas Gilbert, D.O., were **"corrective actions"** instituted by the Medical executive committee, pursuant to Article VII, section 1 and 2, of the Lake Shore Hospital bylaws, in a **"Due Process" Fair Hearing,** and by agreement of the parties to the dispute. Dr. D. Douglas Gilbert, D.O., despite his medical competency woes, he being white, was of course, allowed to **contract his services** to Lake Shore Hospital and to work in its Emergency Room, while the Black Petitioner, Daniel Hodge, who had no restrictions whatsoever on his delineated privileges, was nevertheless, removed from the Lake Shore Hospital Emergency Room physician's (A 161) roster, under malicious pretextual guises, having no medical merit whatsoever, and even then, without even as much as a **Notice,** as the bylaws mandate. This is documentary evidence of the most reprehensible form of raw white racism, if there ever was a more atrocious example.

Dr. D. Douglas Gilbert, D.O., was treated in a manner consistent with the aims of the principles of **Procedural Fair Process**[6] to which all those professionally competent physicians

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[6] The suspensions and restrictions on Dr. Gilbert's privileges were again later modified as follows:

FROM:	James B. Foster, Administrator
SUBJECT:	Privileges of Dr. D Douglas Gilbert
DATE:	November 29, 1988

This is to advise you that the temporary restrictions placed on Dr. D Douglas Gilbert in April of 1986 have been revised as follows:

1. Dr. Gilbert may admit to ICU, but only with co-management by another appropriate physician. The co-management requirement will be reviewed at the end of six months by the Credentials Committee.
2. The CVP line restrictions will continue until he has performed, under the supervision of a co-management physician, five (5) cases with appropriate documentation.

Dr. Gilbert's name remained on the Lake Shore Hospital Emergency

(continued...)

continuously meeting the hospital's qualifications, standards and requirements, and having the privilege of membership on the Medical staff (A 189-200) are entitled and specifically in Dr. Gilbert's case, it was the **"corrective action,"** pursuant to Article VII, section 1(b) (A 190) and Article VIII, section 2 (a) (A 193) of the Lake Shore Hospital bylaws.

Petitioner, Daniel Hodge of whom the Lake Shore Hospital board of directors, in its January 12, 1987 letter, concluded that Dr. Hodge had, **"contributed greatly to the success of Lake Shore Hospital,"** in 1985 and 1986 (A 135) and reappointed and renewed his privileges, for 1987 and 1988, including among other privileges, placement of Central Venous Pressure (CVP) lines, (A 134) has demonstrated by competent evidence that there was, in fact, **disparate treatment** of the Petitioner, Daniel Hodge relative to a **similarly situated** white person, Dr. D. Douglas Gilbert, D.O., who even by virtue of the **"corrective action,"** entitlement pursuant to Article VII, section 1(b) (A 190) of the Lake Shore Hospital bylaws, had suspensions and restrictions placed on his privileges in December of 1985 and April of 1986, because of his incompetence, but who could nevertheless, continue to be president of the Medical staff and work in the Emergency Room, while Petitioner, Daniel Hodge, a most knowledgeable, competent and experienced Black physician,

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[6](...continued)
Room schedule even after the Action was commenced in June 1987 because Petitioner, Daniel Hodge carefully did not mention his name and alleged only that **"white attendings"** had **Due Process.** Although Dr. Gilbert was on the Emergency Room schedule on September 3, 1987, when Petitioner **cross-moved for Summary Judgment** and gave the initials of three white physicians alleged to have had **Due Process** in the handling of their either denial or reduction of privileges, Dr. Gilbert's name disappeared from the schedule all during 1988, the most classic evidence of guilt. Dr. Gilbert's name again appeared on the Lake Shore Hospital Emergency Room schedule February and December 1989, all of 1990 and 1991 to date.

Respondents became convinced that the unentered Judge Curtin, Judgment was in essence and as a practical matter, the end of the **"dessert storm"** and that Respondents' racially **disparate treatment "operations"** could resume as usual. Respondent, James B. Foster, C.E.O., sometime after the dismissal of the action, even unsolicitously boasted about how he knew what he was doing when he, **"got rid of that Dr. Hodge."**

was dropped (A 161) from the Lake Shore Hospital Emergency Room physician's roster, contrary to the recommendation of the Lake Shore Hospital board.

And for a period of six months - from January to June 1987 - Petitioner, Daniel Hodge, could not reason with or (A 145) **persuade**[7] the Respondents, Cardamone, Feldman and Foster or Lake Shore Hospital board to honor the terms of the board's directive and reappointment.

Respondents, Joseph G. Cardamone, M.D., Lynn Feldman, D.O., and James B. Foster, C.E.O., then not even carefully - it isn't at all perceived as essential - pretextually orchestrated a series of contrived and convoluted justifications for the three-some's collective actions, using fraudulent (A 138,139,141,144) post-termination creations, and ex post facto, pseudo-scientific inventions, i.e., **"advisory notices"** which were made in March 1987 and were **"inadvertently not sent to you following the late November Emergency Department meeting"** (A 139). These were the memoranda which were used, to nunc pro tunc, concretize various alleged models of medical malfeasance and **"mispractices,"** purported to have been committed by the Petitioner, Daniel Hodge in contradiction to - and this is the most heinous aspersion - their ill-educated, provincial perceptions of what is **"the generally accepted standard of practice, of public relations**

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[7] In a most implacable and resolute communiqué (A 145) sent on April 24, 1987 to the Lake Shore Hospital Emergency Room committee chairman, Petitioner, Daniel Hodge declared, among other things, that,

"This physician has determined, based on a review of the medical record and by informed and clinically well-experienced judgment, that the treatment afforded John Weeks, was not only appropriate but exemplary in that setting and under those sets of facts and circumstances.

The outcome approaches that of a modern medical miracle because the primary and sole consideration of concern to this physician at that time was to assure viability of his virtually dismembered left great toe, which was bearly [sic] hanging on a thread with a minuscule blood supply in the papillary and reticular dermis perhaps.

Concern about infection was a distant second and even that was appropriately treated with 1 gram of prophylactic Cefazolin and admission.

I expect to be placed back on my regularly scheduled Saturday time slot starting June 1987, if indeed this adverse review was the reason for my discontinuance abruptly without even the courtesy of notice."

oriented, 'showbizz' medicine," which is in diametric and radical tension to the forthrightness of nature, and is a bit too harsh for City or even Country manners, defying even common sense.

The fraudulent (A 141 and 144) post-termination creations and ex post facto, pseudo-scientific inventions, even on their face, provide documentary proof that the allegations of **"incompetence"** being levelled against Petitioner, Daniel Hodge, by Respondent, Joseph G. Cardamone, M.D., were the machinations of a royal, pseudo-scientific hoax, because they were inconsistent with documentary **contradictory assertions** in a September 26, 1986 **"complaint-letter,"** made and sent by Respondent Joseph G. Cardamone, M.D., from himself as a **"complaining"** consultant, to himself as, **"medical performance evaluator,"** and chairman of the Emergency Room committee.

Several months before the need to justify their actions in removing the Petitioner, Daniel Hodge's name from the Lake Shore Hospital Emergency Room physician's roster, Respondent, Joseph G. Cardamone, M.D., had most graphically described his own **clinical findings** (A 142-143) as he had observed on September 26, 1986 and which he recorded in a September 27, 1986 **consultation report** sent to Dr. Velez, a surgeon. The **consultation report,** made by Respondent, Joseph G. Cardamone, M.D., described a 15 year-old white male patient (A 140), who had sustained a virtually severed left great toe, in a dirt-bike accident.

In Respondent, Joseph G. Cardamone, M.D's **consultation report** to Dr. Velez, the surgeon, dated September 27, 1986, Respondent, Joseph G. Cardamone, M.D., divulged that during his September 26, 1986 **"examination and evaluation of the clinical findings,"** with regard to the 15 year-old white male patient's toe injury, Respondent, Joseph G. Cardamone, M.D., as a medical specialty sleuth, uncovered facts about the tōe, that among other things, in a wholly different and even complimentary light, revealed that,

"He does have good capillary filling of the toe . . . The laceration appears clean with some superficial skin necrosis along the edge." (A 142) .

However, in Respondent, Joseph G. Cardamone, M.D's

allegedly same-day, **"simultaneously constructed,"** on September 26, 1986, from himself to himself, **"complaint-letter,"** (A 141) and desultory philippic, on several fronts, attacking Petitioner, Daniel Hodge's professional competency, performance and insubordination, Respondent, Joseph G. Cardamone, M.D., self-servingly exhorted and opined, to himself,

"Dear Dr. Cardamone:

John Weeks was examined in the Emergency Room by Dr. Hodge after a dirt bike accident. The toe had very severe injuries. Dr. Hodge *took it upon himself* to repair this in the Emergency Room. The results of the repair are *certainly less than optimal.* At present time it is necessary that John have additional surgery on his toe. I feel that this should have been evaluated by someone more conversant with the severe injury that he had to his toe and taken care of appropriately at the time of his arrival in the Emergency Room rather than at a later date." (emphasis supplied)

Upon careful analysis of a memorandum (A 144) purportedly made on December 2, 1986 from Respondent, Joseph G. Cardamone, M.D., chairman of the Emergency Room committee to Petitioner, Daniel Hodge, regarding the 15 year-old white male patient, with the virtually severed **left great toe,**[8] it is

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[8] Two factors - one medical, one legal - documentarily support Petitioner, Daniel Hodge's contention that the adverse professional evaluation, was a pseudo-scientific and fraudulent pretext being used after-the-fact to justify the Respondents' unlawful removal of the Petitioner on January 13, 1987, from the Emergency Room physician's roster.

First, medically, in the Churchill Livingston publication entitled, **"Amputation Surgery And Rehabilitation: The Toronto Experience,"** on page 148, with regard to the **"Indications for Amputation,"** the following account is made:

> Amputations in acute injuries of the hand are very often a **"fait accompli,"** and replantation is either ***impossible or unjustified.*** In such cases, the surgical decision is ***not whether but where to amputate.*** The same applies to those cases in which the digit or part of it [sic, is] still attached but badly damaged and avascular. The difficulties in deciding upon whether or not to amputate occur with patients who have a badly damaged but viable digit. Is **primary amputation** in such cases the best treatment? ***There are no rules.*** One can use certain guidelines, but the decision on whether or not to amputate must be made for each individual patient. A **conservative**

(continued...)

clear that the **"incompetent performance evaluation,"** of the Petitioner, Daniel Hodge, by Respondent, Joseph G. Cardamone, M.D., was in a mercurial switch in tone, concocted after-the-fact in March of 1987, so as to **"justify"** the **fait accompli,** previously planned removal of Petitioner, Daniel Hodge, from the Lake Shore Hospital Emergency Room physician's roster (A 161) on January 13, 1987.

Even then, the **"incompetent performance evaluation,"** purportedly designed to, **"prevent future improper treatment of a certain type of injury,"** had resulted in a **silent dismissal,** on January 13, 1987, of the Petitioner, Daniel Hodge by inference, with not even as much as **Notice** and an **opportunity to be heard,** in keeping with the **Due Process** provisions of Respondent Lake Shore Hospital's bylaws (A 189-200), and moreover, a dismissal that was clearly contrary to the expressed directive and wish of the **Lake Shore Hospital board,** which had renewed (A 135) Petitioner, Daniel Hodge's privileges (A 134) for 1987 and 1988.

Respondents have been professing innocence of any conspiratorial activities detrimental to Petitioner, Daniel Hodge's personal, and professional reputation and practice privileges at Lake Shore Hospital or applications for privileges at any other hospitals (A 148-159) and furthermore, asserting that their **internal professional evaluations** had no ill affects at Lake Shore

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[8](...continued)

approach with preservation of the injured digit, is justified in the following situations. (emphasis supplied) (See A 147 for the 5 situations) [Respondents admitted these medical facts in their FRCP 12 (b)(6) motions]

Secondly, legally, Petitioner, contrary to Respondent Joseph G. Cardamone's accusation, did not take it upon himself, but sought the advice and direction of the surgeon, Dr. Velez, whom Respondents admit (A 32) [pursuant to FRCP 12 (b)(6)] had recommended amputating the toe and creating a stump. Dr. Velez was not at the scene to be able to **personally assess** a clinical situation for which, **"There are no Rules,"** and where the decision of whether or not to perform a **primary amputation** must be made with **each individual patient.** Furthermore, the medical literature supports a conservative approach with - if at all possible - preservation of the injured digit [or toe]. Respondents' purported justification for the, **"incompetent performance evaluation,"** was and is documentarily demonstrated here to have been pretextual, and medically and legally to be pseudo-scientific fraud.

Hospital, despite the deletion of the name of the Petitioner, Daniel Hodge from the Lake Shore Emergency Room physician's roster (A 161), and moreover, that such internal evaluations, pursuant to its bylaws, **Article VI, section 1 (b) and (c),**[9] still have no bearing on the actions of other hospitals (A 148-159) in denying Petitioner, Daniel Hodge privileges to practice elsewhere.

On November 6, 1987, Petitioner, Daniel Hodge, was suspended - for the second time in the ***Hodge vs. Kelly et al.,*** cert. den. 490 U.S. 1081 (1989) controversy - without pay from employment as a clinical physician at Attica Prison, after having been placed on **"administrative leave with pay"** nine months before, on March 16, 1987, pending the investigation of alleged **"medical misconduct"** with regard to the resuscitation of an inmate. The Attica Prison local management team and their Albany-based, even more corrupt directors, called in the New York State department of health's, office of professional medical conduct (OPMC), Health Commissioner Axelrod's corrupt

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[9] The Lake Shore Hospital bylaws in Article VI, section 1 (b) and (c) provide with regard to **clinical privileges restricted,** that:

(b) Every initial application for staff appointment must contain a request for the specific clinical privileges desired by the applicant. The evaluation of such request shall be based upon the applicant's education, training, experience, demonstrated competence, references and other relevant information, including **an appraisal by an appropriate department chairman,** if necessary. The applicant shall have the burden of establishing his qualifications and competency in the clinical privileges he requests.

(c) Periodic redeterminations of clinical privileges and the increase or curtailment of same shall be based upon **review of records of patients treated in this or other hospitals** and review of the records of the Medical staff which **document evaluation of the member's participation in the delivery of medical care** and, when necessary, direct observation by appropriate appointed staff members, of care provided. (emphasis supplied)

For those reasons, Respondent, Joseph G. Cardamone, M.D's **"from-himself-to-himself,"** white racist, pseudo-scientific, fraudulent evaluation of Petitioner, and documented - **personal involvement** in this widespread criminal conspiracy - must be forthwith expunged from the professional performance evaluation file of Petitioner, Daniel Hodge. The issue is not that Respondent, Joseph G. Cardamone, M.D., is guilty as claimed but rather how extensive and intensive is his guilt and how intensive and extensive is the damage that all the Respondents directly and indirectly caused, and to this very moment still continue to cause to the Petitioner, Daniel Hodge?

machine, to conjure-up twenty (20) so-called **"substantive charges"** and **"sub-charges"** of **"medical misconduct,"** categorized in six (6) so-called **"specifications,"** aimed at unjustifiably effecting the revocation of Petitioner, Daniel Hodge's license to practice medicine in New York State, in a malicious prosecution for more than three years, during that **"in hibernation"** procedural hiatal unappealable status of being **"in between district and circuit court."**

The New York State department of health's, office of professional medical conduct (OPMC), in the persona of the late **Paul R. White, Esq.,**[10] made rounds at several hospitals where

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[10] New York State department of health, associate counsel for the office of professional medical conduct (OPMC) was killed in an auto accident on August 2, 1990. The late Mr. White had prepared, allegedly pursuant to **Public Health Law, Section 230, Education Law, Section 6509 and the State Administrative Procedure Act, Article 3,** the so-called **statement of charges** containing the twenty (20) alleged cases of **"medical misconduct"** against the Petitioner, Daniel Hodge and prosecuted the case from May 26, 1988 until May 12, 1989.

Mr. White also carried out a so-called **investigative hearing** because Petitioner allegedly gave the OPMC **"reason to believe that he [Petitioner, Daniel Hodge] may be affected by mental disability,"** because of pictures, parodies, satirical essays and vignettes created by Petitioner, Daniel Hodge and being used to lawfully, in keeping with the **First Amendment** of the **Constitution of the United States of America,** fight **Institutionalized White Racism.**

The late Mr. Paul R. White, Esq., ***criminally altered or destroyed*** portions of three medical charts in order to support his case against this Petitioner. The documentary evidence against Mr. White is irrefutable and New York State's defense depends on an event - **the removal of only the Emergency Room chart, consisting of a single page, from a collection of 70 other pages in a Patient's (L) medical record** - with ***probabilistic odds*** that are incredulously unlikely to have spontaneously occurred, during the chain of custody, either in the copying process or record certification procedure or mailing. Mr White, a **Disciplinary Rule** violating, megalomaniacal psychopath, as well as a rifraffin' criminal fraud, could have been sentenced - had he lived - to the federal penitentiary for at least 10 years and fined $ 250,000.00 for tampering with a victim, Petitioner, Daniel Hodge in violation of 18 U.S.C. 1512, for the willful and intentional withholding and concealing of medical records in a conspiracy with the Respondents, from availability for use in an official proceeding, and to support a fabricated charge against Petitioner of having **"missed a diagnosis of bronchopneumonia,"** when that was the **"discharge diagnosis"** and the **"admission diagnosis"** was **"asthmatic bronchitis,"** which was given to the patient by the Emergency Room physician, Dr. Campbell, at WCA Hospital - the

(continued...)

Petitioner, Daniel Hodge worked as a locum tenens Emergency Room physician and collected various alleged acts of **"medical misconduct,"** gathering five (5) of those so-called **"substantive charges"** and **"sub-charges"** of **"medical misconduct,"** in collusion with (A 110, 111, 113) and at Lake Shore Hospital, to wit: (Patient A, an 18 year-old asthmatic malingerer [A 14-24,95,96,136,137]; Patient B, a 15 year-old young man with a virtually dismembered great left toe [A 31-34;140]; Patient M, a 2 year-old infant with a febrile seizure; Patient S, an alleged **"thrombophlebitis"** [inflammation of the leg veins] case; and Patient L, an asthmatic with bronchitis.

REASONS FOR GRANTING CERTIORARI

POINT I: The Supreme Court Of The United States Must Again Declare That Racially Motivated Discriminatory Intent By The Respondents Lake Shore Hospital et al., To Deprive Petitioner, Daniel Hodge Of A Constitutionally Protected Intellectual Property Interest In His Board-Granted Privilege To Practice Medicine Can Be Proved By Documentary Evidence.

It's documentary! The Lake Shore Hospital board of directors, in its January 12, 1987 letter, announced and concluded that Dr. Hodge had, **"contributed *greatly to the success* of Lake Shore Hospital,"** (A 135) in 1985 and 1986, and showed its gratitude, thankfulness and appreciation for Dr. Hodge's **great contribution** by heartily reappointing Dr. Hodge to the Medical and Emergency services staff for not only 1987, but for 1988 as well: A Constitutionally Guaranteed **Privilege-To-Practice** Biannual Prize. ***Board of Regents vs. Roth,*** 408 U.S. 593 (1972); ***Perry vs. Sinderman,*** 408 U.S. 593 (1972) It is indeed

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[10](...continued)
identical diagnosis that Petitioner, Daniel Hodge, had given the patient some 12 hours earlier at Lake Shore Hospital. With the missing WCA Hospital Emergency Room chart, the fabricated charge would stick, but with the WCA Hospital Emergency Room chart present, the charge was a ludicrous assertion. It was dual pseudo-scientific and conventional fraud! The Respondents were the original source of the charge, in their retaliatory effort to totally destroy Petitioner's medical career. The Respondents are heading for some jail time soon.

a most valuable constitutionally protected, personal **Intellectual Property Interest.** 42 U.S.C. 1982. But merely one day later on January 13, 1987, the three malicious Respondents, Cardamone, Feldman and Foster, with racist animus, (A 161) did otherwise! The Respondent Lake Shore Hospital board **said YES!** And the Respondents Cardamone, Feldman and Foster, **said NO!** How should this Court rule?

Should this Court **documentarily** - as even an eight-year old child could know and appreciate - **find and summarily conclude,** that the Lake Shore Hospital board of directors reappointed Dr. Hodge to the Medical and Emergency services staff for not only 1987, but for 1988 as well? (Review p. 7-8 of this Petition)

Petitioner, Daniel Hodge must, therefore, be granted **Summary Judgment** as a matter of law on his claim of having been denied his constitutionally protected **Intellectual Property Interest, Privilege-To-Practice,** in violation of the Lake Shore Hospital bylaws and contrary to the directive (A 135) of the Lake Shore Hospital Board. ***Celotex Corp. vs. Catrett,*** 477 U.S. 317 (1986); ***Matsushita Elec. Indus. Co., Ltd. vs. Zenith Radio Corp.,*** 475 U.S. 574 (1986); ***Anderson vs. Liberty Lobby, Inc.,*** 477 U.S. 242 (1986).

Was the documentary removal of Petitioner's name from the Emergency Room physician's roster **an intentional act**? Was it perhaps merely a clerical error? Or was it merely a phenomenon-a-nature that just spontaneously happens in scientific, democratic America to dark skinned people? The Respondents Cardamone, Feldman were asked for six long months to justify or reinstate. They absolutely refused to reinstate, (A 145) [Review footnote 7, p. 13 of this Petition] and proffered that such refusal was justifiably **for cause,** namely, because of **"legitimate"** claims against Petitioner, of medical misconduct and/or incompetence, which in fact were legally and scientifically totally bogus. Since the claimed misconduct and/or incompetence, were in reality scientifically fraudulent accusations against the Petitioner, then, is that bogus effort to harm the Petitioner, only additional and **substantial evidence of unlawful**

intent to deny Petitioner a constitutionally protected property interest?

It is well established that an intentional discriminatory act in the employment context, may be proved by circumstantial evidence, such as a pattern of conduct by an employer which is unexplainable on grounds other than race. *Domingo vs. New England Fish Co.,* C.A. Wash. 1984, 727 F. 2d 1429 (1987) Can a document or a series of documents provide a similar or perhaps more compelling basis for concluding that an act of employment discrimination or refusal to implement the benefits of hospital privileges was intentional? This Court must declare that discriminatory intent in the employment context, can be proved and established by documentary evidence.

POINT II: The Respondents Lake Shore Hospital et al., In Removing The Petitioner, Daniel Hodge - Without Procedural And Substantive Due Process - From The Lake Shore Emergency Room Physician's Roster, Contrary To Directive Of Their Board, Documentarily Violated Their Bylaws And Federal Anti-Discrimination, Right-To-Contract And Conspiracy Statutes.

Even if this Petitioner were white, Lake Shore Hospital would be still just as liable for having violated several provisions of its bylaws. The Lake Shore Hospital board has not to this very nanosecond officially or otherwise rescinded its 1987 - 1988 grant of privileges to practice medicine to the Petitioner, Daniel Hodge; so, why is Petitioner, Daniel Hodge not practicing at Lake Shore Hospital? Petitioner is still waiting to be put back on the Emergency physicians roster. For the same reasons advanced in POINT I, documentary evidence established unlawful intent by the Respondents in violating their bylaws and federal anti-discrimination, right-to-contract and conspiracy statutes.

POINT III: The District Court In Becoming A Self-Appointed "Medical Expert" For The Respondents And In Making Spurious Procedural Distinctions Between "Admissions" And In Leaving A Judgment Open For Almost Three (3) Years, Merely To Determine "Punitive Attorney's Fees" Against Petitioner, Daniel Hodge, And The Circuit Court's Sanctioning Of Such Conduct As Allegedly Being

Valid And "Interlocutory" And, The Circuit Court's Sedulous Evasion Of Jurisdictionally Proper Issues Presented To It For Resolution, Was So Far A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervision.

A physician who treats a hysterical hyperventilating asthmatic, having not even a wheeze clinically, with hypoxemia-inducing bronchodilators like epinephrine and aminophylline, and thereby cause a precipitous drop in the arterial partial pressure of oxygen in the patient's blood, from a level which is above the normal value of 85-95 millimeters of mercury, to a value (A 137) of 66 millimeters of mercury - is committing malpractice! Federal district court Judge John T. Curtin cannot refute that because Judge Curtin - despite all his **"noble"** attempts to justify and cover-up blatant unlawful racism - is not a **Pulmonologist.**[11] Petitioner was counselled and reprimanded

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[11] Listed here again, are the **Best Evidence** scientific facts **material** and **necessary** to proving that the Respondents' proffered reasons for removing Petitioner from the Lake Shore Hospital Emergency Room physician's roster was pretextual. This scientific **Best Evidence,** presented here and now, is the medically valid reason for **not treating** a hysterically hyperventilating asthmatic with either epinephrine or aminophylline to cause bronchodilator-induced hypoxemia, as shown by data presented even almost 25 years ago, by knowledgeable **scientists** and reported in a very reputable **scientific Journal.**

Severe asthma: Arterial PO_2 after Bronchodilators.
Individual values in the most hypoxic patient of each series.

Drug Tested	Total	Arterial PO_2 Before	After	Authors
Adrenaline SC	9	46	36	**Adrenaline in Bronchial Asthma,** Rees, H.A., Miller J, Donald K, W., Lancet, Vol. 2, p. 1164-1167, (1967).
Aminophylline IV	9	58	50	**Aminophylline in Bronchial Asthma,** Rees H.A. et. al., Lancet, Vol. 2, p. 1167-1169, (1967).

The Court should notice that this is not **new technology**; it's a quarter of a century old. The Court should notice just the numbers representing the **oxygen level** (Arterial PO_2, pronounced **"Pee Oh Two"**), even if the Court does

(continued...)

about this **"asthmatic patient"** incident, and a white doctor who actually treated - and committed malpractice, was perceived to be doing the right thing, by the provincial medical community. This Petitioner has never been and will never be part of that assortment of **"show bizz"** medicine, so as to please patients or parents or nurses or doctors or administrators or boards of directors, when such conduct is scientifically insupportable, in fact, **"High Tech"** fraud and malpractice. That is the way it shall be, as far as this Petitioner is concerned, whether this Court or those below fail to understand or appreciate such personal and professional dedication to that which is scientifically, ethically, morally - and most importantly, legally right. Much to the chagrin of scientists, engineers have traditionally tended not to worry about how something worked - so long as it worked. But specificity and thus efficiency too often suffers as a result. There are **scientific physicians** - like this Petitioner, who know that every why hath a wherefore - and there are **engineering physicians,** who are routine oriented, and sometimes - too often in fact - merely glorified technicians, who sometimes get absolutely lost when inevitably something goes wrong, or varies

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[11](...continued)
not understand the medical significance; it is obvious that the arterial **oxygen level** (Arterial PO_2), in the blood **before treatment** with the drugs listed on the extreme left column were 46 and 58 and that **after treatment** the **oxygen level** (Arterial PO_2), dropped to 36 and 50, respectively.

The phenomenon is called bronchodilator-induced hypoxemia. It is an **adverse side affect** of these drugs and must, as always, be weighed against the **benefits** accruing to the patient. There was absolutely **no benefit** whatsoever to treating a hyperventilating patient when her **oxygen level** was probably way **above normal,** at perhaps 102, when the normal value is 85-95. It would be, in fact, detrimental to the patient and inexcusable malpractice! Such treatment has been linked to increased asthma deaths. **Regular Inhaled Beta-Agonist Treatment in Bronchial Asthma**, Malcolm R. Sears et al., December 8, 1990, Lancet, Vol. 336 p. 1391-1396.

If the Respondents didn't have a scientifically legitimate reason for their accusations of Petitioner's alleged professional incompetence, with regard to the asthmatic, then their **motivations and intentions,** as demonstrated here by Petitioner, were pretextual, discriminatory and unlawful. The **"High Technology"** of Black Oppression must not, in a scientific democracy, be allowed to replace the persistent & pervasive, old fashioned, reprehensible, incidents & badges of slavery and racial discrimination of present and past ages.

significantly from the expected and routine path.

Let this Court hope and pray that should any of its members need critical care, that at that very moment, there is an adamant, argumentative, scientific, Dr. Daniel Hodge-type in the Emergency Room - who will tell an ill-educated, protocol-oriented-airhead nurse or doctor to take a coffee break - rather than, despite the detriment to a patient member of this Court, go along with a routine - and non-individualized, and possibly improper and unscientific - diagnostic and treatment plan. Scientific fraud, which to be sure, is a bit harder to uncover (it takes a cogent knowledge of science, **"commitment, . . . terribly hard work, and competence,"** and perhaps the aid of a high-resolution video computer), but undeniably, **scientific fraud**[12] is like any other fraud, in character and degree - it is no less harmful and just as patently illegal.

There are a few **Independent Professionals,** who simply won't sell their souls, let alone commit illicit acts, and moreover, who will take no part whatsoever in public-relations-oriented schemes and concoctions, designed to maintain professional esteem and personal images (charisma and programs) at the expense of reliable mechanisms conducive to the formation of neutral, scientifically sound, professional judgments, nor will **Independent Professionals** perform various promotional choreographic aerial stunts, that are in dynamic and radical cross-tension to science, let alone, the forth-rightness of nature, which to be sure, has no respect for City or Country manners.

Independent Professionals are the kinds of people, who are in extremely short supply - in any field - but who, most acutely, are the kinds of people that our wonderful country needs most. We may not feel the need to praise them, but we should not destroy them either, least of all through the use of legal legerdemain and artificial, phony judicial schemes, as in this case, so commonly found in our courts, and which are founded, even

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[12] For a current view of the problem of scientific fraud, see two News & Comment articles by David P. Hamilton in **Science**, entitled **"NIH Finds Fraud in Cell Paper,"** Vol 251, p. 1552, 29 March 1991, and **"Baltimore Throws in the Towel"** Vol. 252, p. 768, 10 May 1991.

in these **"High Tech"** changing times, on those old fashioned, collaborative caucasian, past panaceas and the advantageous productions of jealousy, ignorance and race hate.

Judge Curtin's tactics and this Petitioner's battling with him goes back a half dozen years. In an earlier trip up the mountain top-a-Justice, in ***Hodge vs. Kelly et al.***, 86 Civ. 160 C (W.D.N.Y. July 8, 1988) (Curtin, J.), aff'd 868 F. 2d 1267 (2d Cir. 1988) cert. den. 490 U.S. 1081, 104 L. Ed 2d 663 (1989), Judge Curtin had opined, **"I do not find that Plaintiff will be irreparably harmed by the proposed work assignment. If he chooses, he may seek employment elsewhere and still attend law school."** That form of preliminary injunctive Judge Curtin Justice, was meted out to this Petitioner seeking relief from the open jealousy, maliciousness and race hate ingrained in Attica Prison officials, under the direct control of New York's **"Northern Liberal"** governor, for their having converted a set of **three fungible, routine weekly medical clinics,** scheduled and held Monday through Friday from 9:00-11:00 AM, 1:00-3:00 PM and 7:00-9:00 PM, into an instantly concocted, never-before-never-since seen, 10:00 AM - 4:00 PM, clinic monstrosity, having no rational or any other kind of relationship whatsoever, to a legitimate health care objective, but which was merely devised to maliciously preclude law school attendance by this Petitioner, in the middle of the semester, on that vulnerable Valentine's Day, February 14, 1986, in violation of a work contract forbidding the imposition of such schedules, without at least 30 days notice or as a way to discipline an employee. ***Hodge vs. Kelly et al.***, is in the certiorari grave yard, but its memory lingers on, mostly because the pervasively unlawful conduct it sought to annihilate, has yet not - even in this **"High Tech"** age - come to roost on a terrain of old fashioned Justice.

Not unexpectedly - since momentum is the product of the mass and the velocity - Judge Curtin continues in his massive old gestalt of corruption and makes not only fraudulent, sua sponte **"medical opinions"** in the instant case, but spurious legal procedural distinctions between **"admissions"** as well, to help out the white law firms and their clients. In his form of Justice and

"Managing Courts in Changing Times," Judge Curtin - using a specially formulated Newtonian calculus, that would befuddle Leibnitz as well - proposes that there exists a **differential equational dynamic tension** between the substantive truth of a Federal Rules of Civil Procedure, Rule 12 (b)(6), **"offered by the Respondents admission truth"** and a Federal Rules of Civil Procedure, Rule 36 **"requested by the Petitioner admission truth."** In other words, if those spontaneous **Rule 12 (b)(6) offered admissions** were **copied verbatim** onto another sheet of paper and were instead labeled (under the same caption, of course) as **requested Rule 36 admissions,** and sent to the Respondents for confirmation, then according to Judge Curtin, those **verbatim copied admissions** - dy/dx (spoken in the language of the calculus as the derivative of 12 (b)(6) with respect to 36, which a child would know was unity) - would some how be **different.**[13] And so it came to pass, that for that reason Petitioner was, in the district court's pursuance of the virtues of Rule 11, as a noble, fruitful and absolutely efficient way of **"Managing Courts in Changing Times,"** fined $ 2000. Perhaps the **Federal Judicial Center** can help retrain Judge Curtin before he

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[13] Petitioner, Daniel Hodge's assertion that F.R.C.P. 12 (b)(6) and 36 were substantially, in fact, operatively identical, enkindled a fulminant judicial wrath. Said Judge Curtin:

This is a gross misstatement of the law. Plaintiff never served a **request for admission** of facts pursuant to Fed.R.Civ.P. 36, nor were any **facts ever stipulated to** by defendants. There is no other apparent basis for plaintiff's motion for summary judgment. Given plaintiff's grossly improper reliance upon Fed.R.Civ.P. 36 as a basis for his motion for summary judgment and the absence of any other legitimate basis for that motion, defendants are entitled to sanctions for the costs incurred in responding to the motion. ***Eastway Construction Corp. vs. City of New York,*** 762 F.2d 243, 252-54 (2d Cir. 1985). (AP 15-16)

Wouldn't **Rule 36 requests** and **stipulations** be redundant in light of a **Rule 12 (b)(6) offer to summarily admit?** Even in these modern **"High Tech"** changing times, beaming through what seem to be Alzheimeric components of Judge Curtin's statement, there still lurks that old fashioned mens rea perceived to be consonant with corruption and criminality. A Black Plaintiff must, in these modern times, surmount the judicial findings of **High Tech Intentionometers and Motivationometers** to prevail, whereas only conventional **Low Tech,** unmetered judicial caprice & corruption need be utilized for the summary dismissal of valid legal claims. Scientific & forensic excellence!

is impeached, after all, "**Education**[14] **is a key to correcting what lingering signs of** bias **remain in our courts, but the need for education of judges and court staff goes much further.**" Yes, of course, pursuant to Article I, section 3, clause 6, of the **Constitution of the United States of America,** the **education of judges,** according to Article I, section 2, clause 5, (AP 18) pertaining to scientific fraud, corruption and criminality, commences **In the United States House of Representatives,** and is had in a very special Article I, section 3, clauses 6 and 7, (AP 18) proceeding: **In the United States Senate.**

Leaving the judgment open for almost three (3) years, merely to determine ridiculous and unjustifiable "**punitive attorney's fees**" against Petitioner, Daniel Hodge is hardly the kind of standard of performance and, "**results that courts should achieve in such basic areas as access to justice, expedition and timeliness, independence, and accountability.**" It is not at all consistent with, "**commitment, . . . terribly hard work, and competence,**" but is consonant with that same old vestigial corruption, of ages past and **present.**[15] It must be stopped, irrespective of discretionary certiorari. Protecting a constitutional right is not a discretionary matter, for why would we even need a **Constitution,** proclaiming Justice for all, if we only selectively enforce the law for a few, and let others completely escape culpability for constitutional violations?

And moreover, the circuit court's sanctioning of Judge Curtin's egregious judicial conduct as allegedly being valid and "**interlocutory**" while pretending during oral argument (AP 26-34)

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[14] Taken from an address by Associate Justice Sandra Day O'Connor at the Second National Conference on Court Management, Phoenix, Arizona, September 9, 1990 and reprinted in the New York State Bar Journal in February 1991. It was sent by this Petitioner to the members of the United States Senate attached to a letter by Petitioner to Associate Justice O'Connor. This Petition is being sent to all of Congress, the President, the media, the Whole Wide World, including Mr. Gorbachev and Mr. Yeltsin. Justice shall at some point be had, thanks to Rodney King!

[15] Engaging in conduct prejudicial to the effective and expeditious administration of the business of the court is a violation of 28 U.S.C. 372 (c)(1). The district and 2nd circuit court have a problem.

to be genuinely seeking justice, yet in their opinion have sedulously evaded jurisdictionally proper issues presented to it for resolution, may indeed be a **"Fast Track"** to white-is-right **Star Trek,** but is hardly consistent with old fashioned, terrestrial Solomonian Justice. **"Managing Courts in Changing Times,"** is difficult indeed in these **"High Tech Times"** because that old rubberstamp is being perennially perfected, even as we perceive that, **"the art and science of management are essential ingredients in ensuring the administration of Justice,"** since there persists that most expected and predictable, monotonous proclamation that (AP 1) **on consideration whereof,** and no matter how egregious the racist conduct or insupportable the legal foundation, that, **"it is now ordered that the judgment of December 21, 1990, and the interlocutory orders of February 4, 1988, and February 17, 1988, on which the final judgment was based in part, are all affirmed** for substantially the reasons **set forth in Judge Curtin's opinions and orders."** Yes, of course, substantially insupportable under any medical or legal rationale and therefore are totally unlawful.

Moreover, while darting and twisting through a spiral trajectory, various power dives, steep rolls and evasive choreography in their last tactical resort, the circuit court judges George C. Pratt, Roger J. Miner, Frank X. Altimari, further proffer that, **"Plaintiff's state claims were *not specifically developed* in the district court, are not part of this action, and therefore are not before us."** How many other documents must be presented to a federal court to **"specifically develop,"** and to prove that Petitioner, at this very nanosecond, in these **"High Tech"** times, still has hospital board-granted full privileges (A 134-135) to practice at Lake Shore Hospital and was removed from the Emergency Room physician's roster (A 161) and that a white physician having his privileges restricted, is still working at Lake Shore Hospital, whereas Petitioner has been unlawfully denied - under the guise of multiple pretexts and scientific fraud, and without bylaw protective **Procedural and Substantive Due Process** - the **right to similarly contract** his professional services, in blatant violation of 42 U.S.C. 1981?

This is not post-contract discrimination; the contract and practice privileges are still signed, sealed and valid according to the hospital board; it merely lacks enforcement by a federal court, properly invoked to effect enforcement! How is the action still not before the circuit court, even after three years of district court chicanery and unlawful interment? And this is the most gruesome of all - neither was it remanded to be **"specifically developed"** perhaps before an all white, blond & blue eyed jury even, but was summarily dismissed under that pristine principle of white-is-right, collusive corruption. **"Managing Corrupt Courts in Changing Times,"** is difficult indeed in this age of the **"High Technology of Black Oppression."**

POINT IV: Policing Of Circuit Courts Should Be Done By A National Court, Which Can Issue Final Binding Decisions, And Which Could Prevent This Assortment Of Interminable Injustice, Even If Certiorari Review, Having The Usual Precedential Value, Were Not Warranted.

It is fatuous to have to come to our nation's highest Court to seek redress from this assortment of garden variety judicial mediocrity, chicanery, corruption and criminality, so blatantly evident in the instant case, because frankly, this Court has more important tasks to perform than to be policing documentarily obvious, valid legal claims and outcomes, described even then as purportedly being, **"so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision."** The truth more likely is that the instant case is only further confirmation of what Black citizens have, as a practical matter, come to know as being, **"the accepted and usual course of judicial proceedings,"** in our system of Just-Us (whites). The white race promotes itself as being the most intelligent and superior of all-a-gods creations, yet cannot add or subtract or perform the most rudimentary of functions when it involves granting Justice to Black people, who because of degradation, intimidation, and resignation are now being kept in modern mental bondage, even without the chains of corporal confinement of ages past.

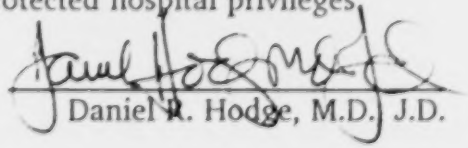
And Lord knows, white folk don't never intenda do nothin' to Nigga's; Black adversity in employment, educational,

social and political matters, is a mere phenomenon-a-nature, which just spontaneously occurs in a scientific democracy. The real issue, however, is hardly a **"High Tech"** marvelous behavioral innovation of capricious evolution. It is age old **Institutionalized White Racism,** of the Dred Scott/Rodney King assortment. It is our **National Disgrace!** It must be stopped! Our state and federal courts must uphold and enforce the **Constitution and laws of the United States of America** (Article VI, cl. 3)(AP 18) and desist playing childish games. Enforcement is a **policing function** having nothing to do with certiorari for interpretation of laws, ***Marbury vs. Madison,*** 1 Cranch 137 (1803), in obvious documentary cases as this is. Moreover, policing optimally should be done by a **National Court,** which can issue final binding decisions - subject to review only by the **Supreme Court of the United States** - as was recommended by the June 20, 1975 report of the **Commission on Revision of the Federal Court Appellate System.** The **National Court,** (Article III, section 1)(AP 18) located jurisdictionally, intermediarily between the circuits and **Supreme Court,** should have a non-partisan or commission system of judicial selection, with judges (including physician/attorneys, engineer/attorneys, accountant/attorneys, musician/attorneys etc.,) appointed for a term of years, making it a blended jewel, being simultaneously less susceptible to life-tenured corruption - although admittedly more susceptible to instability - but exceedingly appropriate for handling all those cases requiring judicial supervision - as opposed to certiorari - because such cases lack precedential value, leaving the certiorari workload of our Supreme Court considerably more manageable.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued for this Court to exercise its power of supervision; so, that Petitioner can finally realize the benefits of his already granted and constitutionally protected hospital privileges.

Dated: Buffalo, N.Y.
August 10, 1991



Daniel R. Hodge, M.D. J.D.

AP 1

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May, one thousand nine hundred and ninety one.

Present:

George C. Pratt,
Roger J. Miner,
Frank X. Altimari,

Circuit Judges.

WDNY
87-cv-566
Curtin

DANIEL R. HODGE,

Plaintiff-Appellant,

- against -

LAKE SHORE HOSPITAL, INC., STAT SERVICES, INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Defendants-Appellees.

This appeal from a final judgment of the United States District Court for the Western District of New York, John T. Curtin, Judge, came on to be heard on the transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment of December 21, 1990, and the interlocutory orders of February 4, 1988, and February 17, 1988, on which the final judgment was based in part, are all affirmed for substantially the

reasons set forth in Judge Curtin's opinions and orders dated February 4, 1988, February 17, 1988, and December 19, 1990, respectively. Plaintiff's state claims were not specifically developed in the district court, are not part of this action, and therefore are not before us. Appellees' requests for appellate sanctions are denied.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

George C. Pratt, U.S.C.J.
Roger J. Miner, U.S.C.J.
Frank X. Altimari, U.S.C.J.

Entered: May 15, 1991

AP 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL R. HODGE, JUDGMENT IN A CIVIL CASE
-vs-
LAKE SHORE HOSPITAL, INC.,
STAT SERVICES, INC.,
JOSEPH G. CARDAMONE, M.D., CIV-87-566C
LYNN FELDMAN, D.O.,
JAMES B. FOSTER, C.E.O.

[ ] JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] DECISION BY COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that santions are awarded against the plaintiff in the sum of $ 2,000.00. The sums of $ 500.00 shall be paid to Cheryl Fisher, Esq., $ 500.00 to Kathleen Frensky Tranelli, Esq., $ 500.00 to John Gadzuk, Esq., and $ 500.00 to Sharon M. Porcellio, Esq. Complaint is dismissed.

December 21, 1990 Clerk, MICHAEL J. KAPLAN

Deputy Clerk, Irene J. Imasulo

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL R. HODGE,

Plaintiff,

-vs- CIV-87-566C

LAKE SHORE HOSPITAL, INC., et al.,

Defendants.

On February 4, 1988, the court issued an order granting the motion of all defendants to dismiss, denying plaintiff's motion for summary judgment, and awarding all defendants costs and attorneys' fees pursuant to Rule 11 sanctions were awarded because of the activities described by the court in its order (Item 20).

A scheduling order was issued on February 17, 1988. In it, the court noted that it would withhold entry of judgment until after the questions of attorney's fees was decided. Nevertheless, a notice of appeal was filed by plaintiff on February 19, 1988 (Item 22).

Cheryl Fisher, Esq., attorney for defendants Stat Services and Lynn Feldman, filed an affidavit on February 25, 1988 (Item 24), requesting $505.00 for attorneys' fees and suggested to the court that Rule 11 sanctions should be applied not only against the plaintiff but also against his attorney.

Kathleen Frensky Tranelli, Esq., attorney for defendant Cardamone, filed an affidavit seeking $520.00 in attorneys' fees and sanctions in the total amount of $794.66, and suggesting that the sanctions should be equally divided between plaintiff and his attorney.

John S. Godzuk, Esq., in behalf of defendant Lake Shore Hospital and James B. Foster, filed an affidavit (Item 26) seeking attorneys' fees in the sum of $890.00. Mr. Godzuk was acting as personal counsel for defendant in the action.

Sharon M. Porcellio, Esq., also acting in behalf of the Hospital and Foster, seeks attorneys' fees in the among of $1,337.00, making a total sum of attorneys' fees in the amount of $2,227.00 sought by the Hospital and Foster (Item 27).

Plaintiff Daniel R. Hodge, M.D., proceeding pro se, filed an affidavit in opposition (Item 28). The tone of the affidavit is revealed by its title, which is as follows: **"Plaintiff's Affidavit in Support of Immediate Judgment, Further Severe Penalties and Fines Against the Plaintiff and for even more Magnanimous Fees for the White Racist Defendants and their Counsels and that the Court then recuse itself due to its Conflict of Interest as Self-Appointed Medical Expert Witness for the Defendants."**

The application of plaintiff for recusal is denied.

On April 29, 1988, the Court of Appeals for the Second Circuit issued a Mandate (Item 29) directing that the appeal be dismissed with sanctions, including double attorneys' fees and costs; and, more particularly, ordered as follows: **"The appeal is dismissed. However, appellee is allowed only ordinary costs on this appeal, without prejudice to the application in the district court for costs and attorneys' fees pursuant to Fed.R.Civ.P. 11."**

Following this, defendants Stat Services and Lynn Feldman, through their attorney, Cheryl Fisher, Esq., filed and affidavit seeking an award of attorneys' fees incurred in obtaining the dismissal of plaintiff's appeal. In her affidavit, Ms. Fisher relates that before the plaintiff filed his notice of appeal, he was notified by the Clerk that the court's order was non-final and that appeal was premature. An affidavit submitted by Ms. Fisher requests an award of attorneys' fees for defending against plaintiff's appeal in the sum of $1,100. She has attached the

memorandum which she filed with the Second Circuit on May 18, 1988.

Plaintiff filed an affidavit in opposition to defense counsel's application. He entitles his affidavit **"Plaintiff's Affidavit of Justice"** (Item 32).

In assessing an appropriate sanction, I find that it is clear that the main force in deciding how this case should be processed was that of the plaintiff himself. Therefore, any sanction imposed should fall principally upon his shoulders. On the other hand, substantial money sanctions will not be of much benefit to defendants and may place a severe hardship on the plaintiff.

The attorney was not active in pursuing the appeal, and although his letter of February 19, 1988 (Item 23) may arguably be incorrect, I do not feel under the circumstances that there is sufficient cause to sanction him personally. The application to sanction the attorney is denied.

Sanctions are awarded against the plaintiff in the sum of $2,000.00. The sum of $500.00 shall be paid to Cheryl Fisher, Esq., $500.00 to Kathleen Frensky Tranelli, Esq., $500.00 to John S. Godzuk, Esq., and $500.00 to Sharon M. Porcellio, Esq. It is the intention of the court that this amount shall represent sanctions for all actions of the plaintiff in the District Court and in the Appellate Court. The Clerk shall enter judgment accordingly, and shall also enter judgment dismissing the complaint.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: December 19, 1990

AP 7

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HODGE v LAKE SHORE HOSP.

88-7157
NOTICE OF MOTION
Dismissal of Appeal
with Sanctions

MOTION BY:

Cheryl Smith Fisher,Esq.
Magavern & Magavern
20 Cathedral Park
Buffalo, NY 14202
(716) 856-3500

OPPOSING COUNSEL:

Daniel R. Hodge, pro se
1528 Statler Towers
Buffalo, NY 14202
(716) 691-3300

Terrence D. McKelvey, Esq.
1301 Statler Towers
Buffalo, NY 14202
(716) 852-0586

Has consent of opposing counsel:
A. been sought?[]Yes []No
B. been obtained?[]Yes []No
Has service been effected?[x]Yes []No
Is oral argument desired:
[]Yes [x]No
{Substantive motions only}
Requested return date:
April 15, 1988
{See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order?[]Yes [x]No

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTION PENDING APPEAL

Has request for relief been made below? []Yes []No
{See F.R.A.P. Rule 8}
Would expedited appeal eliminate need for this motion?
[]Yes []No
If No, explain why not.
Will parties agree to maintain the status quo until the motion is heard? []Yes []No

B. by firm date of argument notice?[]Yes [x]No

Judge or agency whose order is being appealed:
John T. Curtin, U.S. District Court, Western District of New York

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Brief statement of the relief requested:
Dismissal of appeal, with sanctions, including double attorneys' fees and costs
By: {signature of attorney}
Cheryl Smith Fisher
Appearing for: (Name of Party)
Date: March 16, 1988 Stat Services, Inc.
Lynn Feldman, D.O.
Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby disposed of as follows: The appeal is dismissed. However, appellee is allowed only ordinary costs on this appeal, without prejudice to the application in the district court for costs and attorneys fees, pursuant to Fed. R. Civ. P. 11

WILFRED FEINBERG,
Chief Judge
THOMAS J. MESKILL,
LAWRENCE W. PIERCE
Circuit Judges

Entered: April 20, 1988

AP 9

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL R. HODGE, M.D.
Plaintiff,

-vs- CIV-87-566C

LAKE SHORE HOSPITAL, INC.
STAT SERVICES,INC.
JOSEPH G. CARDAMONE, M.D.
LYNN FELDMAN, D.O., and
JAMES B. FOSTER, C.E.O.,
Defendants.

APPEARANCES: TERRENCE D. McKELVEY, ESQ., Buffalo, New York, for Plaintiff.
MAGAVERN & MAGAVERN (CHERYL SMITH FISHER, ESQ., of Counsel), Buffalo, New York,
NIXON, HARGRAVE, DEVANS & DOYLE (KATHLEEN TRANELLI, ESQ., of Counsel), Rochester, New York, 14663
-and-
DAMON & MOREY (SHARON M. PORCELLIO, ESQ., of Counsel), Buffalo, New York, for Defendants.

Plaintiff in this action is a black physician. He alleges that defendants, acting from racially discriminatory motives, defamed him and dropped him from the Emergency Room physicians' roster at defendant Lake Shore Hospital, Inc. [Lake Shore]. Plaintiff alleges that defendants' actions also prevented him from contracting with other hospitals and physician's referral agencies. Plaintiff contends that defendants' action constitute interference with contract, conspiracy to interfere with contract, and neglect to prevent interference with contract under 42 U.S.C.

sections 1981, 1985, and 1986. Plaintiff seeks, inter alia, $10,000,000.00 punitive damages and $10,000,000.00 damages for emotional distress. Plaintiff also claims that he is entitled to an award of attorneys' fees under 42 U.S.C. 1988.

All defendants move, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss plaintiff's complaint. Plaintiff cross-moves for summary judgment. Defendants Lake Shore, Stat Services, Inc., [Stat Services], Lynn Feldman, and James B. Foster move, pursuant to Fed.R.Civ.P. 11, for attorneys' fees and costs incurred in responding to plaintiff's cross motion for summary judgment. The court heard **oral argument.**[1]

Facts

For purposes of determining defendants' motions to dismiss, the court assumes plaintiff's factual allegations to be true. The following is a brief summary of the facts according to plaintiff, as alleged in his complaint and affidavit and the exhibits thereto.

Plaintiff states that his services were provided to defendant Lake Shore through defendant Stat Services. Item 1, 12. The latter contracts with Lake Shore to provide the hospital with 24-hour Emergency Room [ER] physician coverage. Plaintiff was granted temporary work privileges, making him eligible to work on the Lake Shore ER staff, in 1986, and he was reappointed for 1987-88. Item 1, Exhs. 1-4.

Plaintiff states that during 1986 and early 1987, he was

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[1] At the request of plaintiff's counsel, oral argument on these motions was adjourned by order from December 18, 1987, to January 22, 1988, after several prior adjournments. In the order, the court directed that if plaintiff or his attorney was not ready to proceed on January 22, the court would consider the motion submitted. On January 22, 1988, neither attorney for plaintiff nor plaintiff appeared. All three defense counsels were present and ready to proceed. The court asked the Clerk to make a telephone inquiry at Mr. McKelvey's office. It was then learned that he was in Rochester and unable to be in attendance. With that, the court considered these motions submitted.

involved in a number of disputes with defendants regarding his treatment decisions and his relations with patients. Item 1, para. 4-6; Item 2, para. 8-64. Plaintiff's treatment of a patient's nearly severed toe was the subject of an ER Committee meeting in March, 1987. Plaintiff was invited to this meeting, but did not attend. Item 1, Exhs. 6, 7. The Committee reviewed and later provided plaintiff with a letter critical of plaintiff's treatment decision in this instance from defendant Dr. Cardamone, a private physician in Dunkirk, New York, who has staff privileges at Lake Shore and was voluntary chairman of Lake Shore's ER Committee in 1986.

Plaintiff states that after the March, 1987 meeting of the ER Committee, he was no longer scheduled for his **"regular Saturday time slot"** in the Lake Shore ER. Item 1, Exh. 12. He alleges that defendant Foster, administrator of Lake Shore; defendant Feldman, president of Stat Services; and defendant Dr. Cardamone acted in concert, from racially discriminatory motives, to drop plaintiff's name from the ER physician's roster. Item 1, para. 7. Plaintiff alleges that the Board of Directors of Lake Shore **"neglected to prevent this conspiracy"**. Item 1, para. 11.

Discussion

1. Plaintiff's Section 1981 Claim

Section 1981 of Title 42 provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 can be violated only by intentional,

purposeful discrimination. **General Building Contractors Ass'n., Inc. v. Pennsylvania,** 458 U.S. 375, 391 (1982); **Guardians Ass'n. of NY City Police Department, Inc. v. Civil Service Commissions,** 633 F .2d 232, 268 (2d Cir. 1980), aff'd on other grounds, 463 U.S. 582 (1983). Plaintiff must allege disparate treatment of similarly situated white doctors. **Long v. Ford Motor Co.,** 496 F.2d 500 (6th Cir. 1974).

Plaintiff alleges that defendants dropped him from the ER Physicians' roster in March, 1987, thereby depriving him of the right to make and enforce a contract to the same extent enjoyed by white doctors. However, plaintiff's own affidavit provides overwhelming evidence that plaintiff's dispute with defendants had its origin in differences about medical treatment, not in differences of race.

Plaintiff's affidavit describes, for more than 20 pages, the history of his disputes with defendants about his medical treatment decisions in the ER and his method of dealing with patients. Plaintiff states his general view that:

Patients can and do use their bona fide chronic disease(s) with varying degrees of leverage, pivotally in socially conflictual life situations for some secondary gain, far more frequently than is commonly recognized or believed by physicians generally and Emergency Room physicians more specifically.

Item 2, para. 15. Plaintiff's memorandum of law also advises that the **"plaintiff is also of the opinion that hospitalization is for truly sick people, not a dumping ground for troublesome elderly or a haven for malingerers".** Item 13, p.3.

Plaintiff then describes his **"frank and honest"** conduct in treating patients on several occasions which became the source of disputes with defendants. He notes, for example, that he advised an asthmatic woman breathing at twice the normal respiration rate that she was primarily hysterical, and only secondarily asthmatic. Item 2, paras. 8, 28. Plaintiff defends his

actions as follows:

"Pretending along with the patient or even worse not recognizing the nature of the problem, and treating a malingerer as if his or her problem were valid and credibly related to their chronic disease, for fear that the patient or parent may unpredictably or even predictably would react in a negative fashion, is despite the popular notions to the contrary, not appropriate management of the hysteric. When the emperor has no clothing, he has no clothing."

Plaintiff states that he also advised the patient's mother that although she **"may not like to know what is really happening here,"** her daughter was **"breathing, purposely, a lot more than she has to [and] trying very hard to make us believe"** that she was having an asthma attack. Item 2, para. 38.

Plaintiff states that defendant Dr. Feldman criticized plaintiff for his treatment of this patient, noting that the patient's arterial blood gas result was abnormal and indicative of asthma. Plaintiff again asserted that the blood gas reading was the result of the patient's **"deliberately overbreath[ing] for one hour."** Item 2, para. 33.

Plaintiff's affidavit describes several other similar disputes with defendants about plaintiff's treatment of patients in the ER during 1986. As described by plaintiff himself, all of these disputes clearly originate from serious differences about proper medical treatment. Plaintiff defends, in great detail, his medical knowledge and judgment in each instance, and attacks that of defendants. However, he makes only the most conclusory allegations of racial discrimination, and provides no facts alleging disparate treatment or discriminatory motive. Bare conclusory allegations of racial discrimination do not state a claim under section 1981; **"[r]acial motive 'in the air, so to speak will not do.'" Armstead v. Town of Harrison,** 579 F. Sup p. 777, 780 (S.D.N.Y. 1984), quoting **Palsgraf v. Long Island RR,** 248 N.Y.339 341 (1928). In sum. plaintiff's own affidavit clearly

establishes the non-racial reasons for his dismissal, and plaintiff's complaint fails to allege any facts which would indicate disparate treatment by defendants of white doctors in similar circumstances. Plaintiff therefore has not stated a cause of action under section 1981 against any defendant, and his claims under section 1981 are dismissed.

2. Plaintiff's Section 1985 and 1986 Claims

Plaintiff claims that defendants conspired to deprive him of his civil rights as proscribed by section 1985(3) of Title 42. Section 1985(3) prohibits conspiracies to deprive persons of the equal protection of the laws, or equal privileges and immunities under the laws. The rights, privileges, and immunities that section 1985(3) vindicates must be found elsewhere, **United Brotherhood of Carpenters and Joiners v. Scott,** 463 U.S. 825, 833 (1983), and here the right claimed to have been infringed has its source in the due process clause of the fourteenth amendment. Item 1, para. 9. Because that amendment restrains only official conduct, to make out his section 1985(3) claim, it was necessary for plaintiff to prove that the State was somehow involved in or affected by the conspiracy. Id. However, plaintiff makes no allegations of state action in his complaint, and has therefore also failed to state a claim against any defendant under section 1985(3).

Section 1986 imposes liability for failing to prevent the wrong perpetrated in a section 1985(3) conspiracy. Because plaintiff's section 1985 claim fails against all defendants, his section 1986 claim is dismissed as well.

3. Rule 11 Motion for Attorneys' Fees and Costs

Defendants Lake Shore, Stat Services, Lynn Feldman, and James B. Foster move for attorneys' fees and costs incurred in responding to plaintiff's cross motion for summary judgment. Item 14, 15.

In their motions to dismiss, defendants accurately note that for purposes of their motions, they must presume all factual allegations by plaintiff to be true. In response to defendants' motions, plaintiff served a memorandum of laws signed by his attorney in support of his cross motion for summary judgment. In this memorandum, counsel for plaintiff contends that defendants have, by presuming all of plaintiff's factual allegations to be true, admitted such facts pursuant to Fed.R.Civ.P. 36, and that upon those facts plaintiff is entitled to summary judgment. Counsel for plaintiff contends as follows:

"In their memorandum, counsel for the defendants . . .make a preliminary statement, in which they attempt to leave the door open to later refute the factual allegations of the plaintiff's complaint and affidavit, by quoting J.W. Moore and J. D. Lucas , 2A Moore's Federal Practice, 12.07 (2-5). That smoke screen unfortunately will not later be converted into a useful defense, because once defendants admit that the factual allegations are true, the matter is settled. F.R.C.P. 36(b). If there are factual allegations and/or legal conclusions and opinions couched as factual allegations, to which the defendants take exception or which are objectionable on whatever grounds, then defendants should so state in specific terms. F.R.C.P. Rule 36(a). Presently all factual allegations must not only be given a presumption of truthfulness, but are legally valid admissions. If operative facts are inappropriately applied when plaintiff makes what can actually be termed legal conclusions, then the court, whose function is to apply the operative fact to the law, will make appropriate corrections. But, the liability and culpability of the defendants for admissions, regardless is a settled matter and is conclusively established." Item 13, pp.7-8.

This is a gross misstatement of the law. Plaintiff never served a request for admission of facts pursuant to Fed.R.Civ.P. 36, nor were any facts ever stipulated to by defendants. There is no other apparent basis for plaintiff's motion for summary judgment.

Given plaintiff's grossly improper reliance upon Fed.R.Civ.P. 36 as a basis for his motion for summary judgment

and the absence of any other legitimate basis for that motion, defendants are entitled to sanctions for the costs incurred in responding to the motion. **Eastway Construction Corp. v. City of New York,** 762 F.2d 243, 252-54 (2d Cir. 1985). Though defendant Dr. Cardamone has not moved for such costs, he, as well as all other defendants, have responded to plaintiff's motion by affidavit otherwise (Items 14, 15, 17). Accordingly, I find that all defendants in this action are entitled to sanctions under Rule 11. Defendants are directed to submit, by March 15, 1988, affidavits setting forth their respective costs and attorney's fees incurred in responding to plaintiff's motion for summary judgment. Plaintiff shall thereafter submit by May 3, 1988, any objections to the amounts specified in defendants' affidavits. Both plaintiff and defendants are directed to discuss whether Rule 11 sanctions should be applied to plaintiff only, to plaintiff's attorney only, or to both.

To summarize, the motions of all defendants to dismiss plaintiff's complaint are granted. Plaintiff's cross motion for summary judgment is denied, and all defendants are awarded, pursuant to Rule 11, costs and reasonable attorney's fees incurred in responding to that motion. The court shall later determine the amount of costs and fees to be awarded, and whether they shall be imposed upon plaintiff, plaintiff's attorney, or both.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: February 4, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL R. HODGE, M.D.,

Plaintiff,

-vs- CIV-87-566C

LAKE SHORE HOSPITAL, INC., et al.,

Defendants.

The defendants shall file detailed affidavits in support of their application for attorney's fees not later than February 29, 1988. Plaintiff may respond by March 21, 1988. The court will then consider the application submitted.

The court will withhold entry of judgment until after the question of attorney's fees is decided. If any party believes that judgment shall be entered earlier, the court shall be notified with the reasons for such entry.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: February 17, 1988

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Constitution, Art. I, sect 2, cl. 5

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

U.S. Constitution, Art. I, sect 3, cl. 6

The Senate shall have the sole power to try impeachments. When sitting for that purpose, they shall be on oath or affirmation.

U.S. Constitution, Art. I, sect 3, cl. 7

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the Unites States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

U.S. Constitution, Art. III, sect 1

The Judicial Power of the United States shall be vested in on Supreme Court, and in such inferior courts as the Congress may from time to time establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during continuance in office.

U.S. Constitution, Art. VI cl. 3

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.Constitution, Amendment V

...nor be deprived of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment XIV

Section 1. ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1981

Equal rights under the law: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1982

Property rights of citizens: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. 1983

Civil action for deprivation of rights: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

subjected, any citizen of the United States or o ther person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for red ress."

42 U.S.C. 1985

Depriving persons of rights and privileges: in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action.

42 U.S.C. 1988

In any action of proceeding to enforce a provision of section 1981, 1982, 1983, 1985 and 1986 of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

AP 21

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DANIEL R. HODGE,

Plaintiff-Petitioner,

-against- Docket No. 91-7063

LAKE SHORE HOSPITAL INC., et al.,

Defendants-Respondents.

Heard May 9, 1991
Courtroom #1705
United States Courthouse
40 Foley Square
New York, New York

BEFORE: GEORGE C. PRATT,
Presiding
ROGER J. MINER
FRANK X. ALTIMARI
Circuit Court Judges

(Transcribed By Tape)

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APPEARANCES:

DANIEL R. HODGE, M.D.
Petitioner

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Attorney for Respondent
Joseph G. Cardamone, M.D.

THOMAS R. SMITH, ESQ.
Attorney for Respondent
Lake Shore Hosp., Inc.
James B. Foster

CHERYL SMITH FISHER, ESQ.
Attorney for Respondent
Stat Services and Doctor Feldman

--oo0oo--

JUDGE PRATT: Hodge against Lake Shore Hospital.

DOCTOR HODGE: May it please the Court, I am Daniel Hodge, Plaintiff-Appellant. What you have before you here is a documentary summary judgment disposition on every claim.

No jury needs to say that Doctor Hodge was granted full privileges at Lake Shore Hospital to practice in 1987 and 1988, signed by Delmar Brinkman, Lake Shore Hospital Board Chairman, on December 23, 1986, and announced in a letter to Doctor Hodge on January 12, 1987. It is in the appendix on 134 and 135. No jury needs to say that Doctor Hodge was removed from the Lake Shore Hospital physicians roster only one day later on January 13, 1987 at page 161. That is documentary summary judgment, regardless of any proffered reasons for the denial of hospital privileges.

No jury needs to say that Doctor Hodge was removed from Lake Shore Hospital without this ad hoc committee report of corrective action interview, which is mandatorily required pursuant to Article 7, Section 1-B and C of the Lake Shore Hospital bylaws. These red anemic briefs have not one word to talk about those bylaws which were summarily violated. No jury needs to say that Doctor Hodge was removed from the Lake Shore Hospital emergency room physicians roster without a notice and an opportunity to be heard, as is mandatorily required pursuant to Article 8, Section 1 through 7 there, that hearing and appeal review procedure that any person, white or black, deserves to have before they are removed. It's Documentary summary judgment disposition regardless of any proffered reasons for the denial of bylaw mandated due process protections.

No jury needs to say that Doctor Hodge is black, and there is another doctor, Doctor Gilbert is white. They admit this. Doctor Gilbert, who has his privileges compromised - and they have a right to do that - is allowed to practice anyhow. Doctor Hodge is removed from the emergency room roster, although he has full privileges. They voice these so-called legitimate non-discriminatory reasons why they removed this doctor without

all these protections, without even notice. Well, it turns out, he's very argumentative, callous attitude. Well, are these conclusionary allegations and accusations also, which they can use? They can call people anything they want. Just come into the court with something to prove it, so the Court can conclude with you, that you, in fact, are right in terms of your so-called conclusionary allegations.

Improper treatment of patients, they claim, and differing opinions. Well, so what? Differing opinions have to mean something. Asking Judge Curtin to properly determine an arterial blood gas analysis is like asking Mickey Mouse a medical opinion. He has no place discussing those kinds of matters without medical expert help. He can't even explain why he kept a judgment open for three years without entering the same for some ministerial act of allowing attorney's fees of two thousand dollars for a black man, who already was denied fifty-five thousand dollars a year for three years in a row. He can't explain that.

I want the counsels when they come right here before you, who are defending these people, to say what it is that a patient, who has an arterial blood gas determination of a partial pressure of carbon dioxide of 23.4, and a partial pressure of oxygen of 66.7, as is right here in this brief on Page 137, whether or not that is an asthmatic fraud being mistreated by a white doctor, and whether or not that is malpractice, which it is, based on the information I have provided the Court right here on Page 45, in that footnote, from an all white journal from England over there, the Lancet, and it is not even modern medicine. Twenty-five years ago, that stuff was available to doctors who know.

This doctor practiced right here, trained here in Kings County, where we have emergency rooms with an asthmatic room specifically designated for asthma, ten people sometimes lined up on a wall there having to treat. That is the kind of training I have had. I am not going to let anybody - I don't care who they are - to interfere with me making a valid judgment clinically speaking about a patient's condition, and then properly handling it without malpractice. I don't care what the nurse says.

Hodge is very argumentative; he is a hard guy to get along with, because he won't tolerate nonsense. If it was your granddaughter, do you want a Hodge to say no, she does not get treatment, because that is the way it is? That is what this country is about.

It is not about you do something because your buddy said so, or you do something because you got to protect doctor so-and so, who is white, green, pink or whatever. And it makes no difference whether he drives a Cadillac or he drives an Escort. It makes no difference to me what he does. The thing that you do to determine his legal status is the governing law, not some social status. That is essentially what you have before you here, and these people determined, ultimately got together ruining my name with every hospital that they can think of, putting all kinds of stories in there that have no legal merit whatsoever; and it continues.

It even got to the point where the counsel, who have to abide by disciplinary rules, go on to make things in affidavits - totally fraudulent - bringing in facts, undisputed facts, sure, just as immaterial as they are undisputed, to the point of actually lying, putting the stuff, work products of counsel, putting the stuff in affidavits, a violation of federal law, going on to try to tamper with the victim in violation of 18 USC 1215. It turns out, there is no way in the world, reviewing this record, even from anyone who has got any expertise whatsoever in medicine, who is not connected to some special interest, who can, as a scientist say, hey, this doctor did what was right.

This doctor did not get involved in all kinds of show-biz medicine. I don't practice show-biz medicine. Medicine is hard enough as it is. It is a science which is an art, too. You have to know when to not do something. You have to know when you can interfere, and do more harm than good, and you have to do this. Your hands have to be untied by all kinds of ridiculous considerations that are totally immaterial to your making a decision about someone's life, someone's health, someone's whole conduct of the rest of their days. That is what is before you. A doctor who stands up and says I won't do it because I can't justify, that doctor gets thrown out, but the doctors who are

white, for whatever reason, are kept there anyway, and this doctor is thrown out. There is summary judgment on every issue in this case.

JUDGE PRATT: Thank you, Doctor Hodge. Ms. Clemens.

MS. CLEMENS: May it please the Court, my name is Margaret Clemens, and I represent one of the Appellees here, Doctor Joseph Cardamone. I will address two of the issues that are pending before the Court today, and my co-counsel will address the remaining two between them. The issues that I will address were not decided by the Court below, and did not form part of the Court's opinion. The first is that Section 1981 has been held by the United States Supreme Court since this case was decided below, as not extending any protection to post contract formation conduct. The conduct --

JUDGE PRATT: You are referring to Patterson, is that it?

MS. CLEMENS: That is Patterson versus McLain, yes, Your Honor. The conduct that is alleged in this case involves an allegedly discriminatory removal from a roster, which is, in essence, a termination of employment, and that is very clearly seen in the record at Page 13 in Paragraph 6 of the Plaintiff's affidavit, and in the record on Page 26, in Paragraph 45. He is talking about a discriminatory dismissal from the hospital. That type of conduct is not covered any longer by Section 1981, and the Supreme Court made that clear in that Patterson decision.

JUDGE PRATT: How about by 1985, because he alleges it is a conspiracy?

MS. CLEMENS: In order to state a claim under Section 1985, you either need state action, which there is none, and the Court below found there was none, or you need a viable Section 1981 claim, which does not have one.

JUDGE PRATT: How about Griffin against Breckenridge,

which says that the 13th Amendment is a sufficient constitutional basis for asserting a claim of private conspiracy under 1985?

MS. CLEMENS: I understand that, but to state a claim under 1985, you have to have a claim under the 13th Amendment, and in this case, we don't believe that the Plaintiff has initially met that burden, and that is what the Court below found, that he --

JUDGE PRATT: Racial discrimination isn't the 13th Amendment? Isn't that at the heart of it?

MS. CLEMENS: Yes, but the Court below found --

JUDGE PRATT: Invidious racially discriminatory animus?

MS. CLEMENS: If that were the case, if there were evidence that the decision below was based on racially discriminatory animus, then that may form the basis, but the Court below --

JUDGE PRATT: Isn't that his whole claim?

MS. CLEMENS: That is his claim, but the Court below found that there was no basis for it, and my co-counsel is going to address that particular issue in more depth. The second issue that I would like to address involves only my client, Doctor Cardamone, because he himself had no personal involvement in the decision that forms the basis of this complaint. Doctor Cardamone is a private physician. He made a complaint that is in the record at Page 144 concerning one incident of treatment of a toe to the emergency room committee, which is basically a quality assurance committee. He did not sit on the committee at the time. He made --

JUDGE PRATT: Was that the asthma patient?

MS. CLEMENS: No, that is the patient that had a

severely injured toe that was nearly severed, and he made a complaint that the treatment that was given was very inadequate, and would they please investigate. As I said, that is in the record at Page 144, but he did not and was not involved in any decision-making in whether or not he was to actually be removed from the emergency room roster.

JUDGE MINER: Can the complaint in this case be read to allege pendant state claims towards contract interference and contract slander, and so forth?

MS. CLEMENS: They are not specifically asserted in the complaint, and if -- so they were not reached by the Court below. For defamation, he would need more than -- he would have to, under New York law, allege a lot more with more specific allegations what the defamatory statements were. If you look at the record at Page 144, that is pure opinion as far as whether or not medical treatment was inadequate. For these reasons, we believe that the Court should be affirmed below.

JUDGE PRATT: Thank you, Ms. Clemens. Mr. Smith.

MR. SMITH: May it please the Court, Your Honors, my name is Thomas Smith, and I am an associate at Damon & Morey in Buffalo. We represent Lake Shore Hospital and James B. Foster in this action. The issue in this case under Section 1981, Doctor Hodge has to show intentional discrimination to state a cause of action. Now, because there is no state action, and, as Ms. Clemens explained, he cannot show a 1981 cause of action, he cannot recover under 1985, and therefore, the claim under 1986 also fails. Now, Doctor Hodge has made numerous --

JUDGE PRATT: Do you buy that?

MR. SMITH: Excuse me?

JUDGE PRATT: Do you buy that, that you have not got

state action, therefore, the claim is no good under 1985?

MR. SMITH: I am sorry, Your Honor, I could not hear you.

JUDGE PRATT: Do you buy that argument that you are advancing?

MR. SMITH: Yes, Your Honor.

JUDGE PRATT: You'd better go back and read Griffin against Breckenridge. It clearly says that the 14th Amendment and the 13th Amendment are alternative bases for claims under 1985 when you have racial discrimination.

MR. SMITH: Well, Your Honor, the 14th Amendment would require state action.

JUDGE PRATT: I understand that, but the 13th does not.

MR. SMITH: But the 13th Amendment has at no point been argued in this case, and it hasn't been pled by the Plaintiff.

JUDGE MINER: It is still there if he pleads 1985.

JUDGE PRATT: He pleads racial discrimination.

MR. SMITH: Well, he would still need to show a conspiracy. He has put nothing -- any allegations that would support a conspiracy, and even in support of his own summary judgment motion, he has submitted no proof that would show a conspiracy, and that is what it comes down to here. He has numerous conclusory allegations, but there is nothing to support any of them. Because he cannot show any direct evidence of discriminatory intent under Section 1981, he has to use circumstantial evidence to create an inference of discriminatory intent.

JUDGE PRATT: What did the district court have before it when it made its determination on the summary judgment?

MR. SMITH: Before the district court was, I would say, the pleadings, the Plaintiff's lengthy affidavit, which was submitted along with his complaint, and the Plaintiff also submitted a memorandum of law containing some factual allegations.

JUDGE ALTIMARI: What did the Defendant interpose?

MR. SMITH: The Defendants put -- there was an affidavit from James B. Foster, and an affidavit was submitted on behalf of Doctor Cardamone.

JUDGE MINER: Are there pendant state claims pleaded?

MR. SMITH: Enough facts have not been alleged to sustain pendant state claims, and they have not been argued at any point in this case. Plaintiff has not made any argument about pendant state claims.

JUDGE MINER: The complaint says pendant jurisdiction is also invoked as derived from a common nucleus of operative facts.

MR. SMITH: But there are no claims, Your Honor, within the complaint, and at no point --

JUDGE MINER: You represent the hospital, don't you?

MR. SMITH: Yes.

JUDGE MINER: Doesn't he charge the hospital with failure to comply with its bylaws?

MR. SMITH: Yes, Your Honor.

JUDGE MINER: Is that a state claim, a pendant claim?

MR. SMITH: Well, whether that would sufficiently state a state claim at this point, I don't know, but if his federal claims do not stand, then this case is properly dismissed anyway, and he cannot --

JUDGE MINER: That's a discretionary matter with the district court, isn't it?

MR. SMITH: Well, if his federal claims have all been dismissed, then he no longer has any basis for pendant jurisdiction.

JUDGE MINER: Well, United Mine Workers against Gibbs says that that is a discretionary matter, doesn't it?

JUDGE PRATT: Not only that, but we've got a new statute, a supplemental jurisdiction, which --

JUDGE MINER: That's right, we have a new statute that tells us to hang in with those cases.

MR. SMITH: Well, Your Honor, again, it is our feeling that any state claims have not been properly pled in this case, and it has not been argued at any point up until now.

JUDGE PRATT: He argued among -- his oral argument here, he says he is discharged without a hearing as required by their bylaws.

MR. SMITH: Well, the issues in the case, Your Honor, have all dealt with Sections 1981, 1985, and 1986.

JUDGE MINER: Why do you keep saying that, when he has plead this pendant state claim for bylaw violation, that is what we are talking to you about, he has argued it here, he has discussed it in his papers, what more can he do, other than have

it tried as a matter of fact, whether there was a violation?

MR. SMITH: Well, Your Honor, if there are --

JUDGE MINER: We talk about that as a triable issue.

MR. SMITH: Well, Your Honor, if there are pendant state claims which have been properly pled, then certainly those claims would have to go back to the district court to be determined, because nothing has happened on them to this point. Thank you.

JUDGE PRATT: Thank you, Mr. Smith. Ms. Fisher.

MS. FISHER: Thank you, Your Honor.

I am Cheryl Smith Fisher from Magavern & Magavern and I represent Appellee Stat Services and Doctor Feldman. I am here today to speak about the sanctions issue. I would like to digress just a moment on the question of whether a properly pleaded claim was made as far as violations of the bylaws are concerned. That is a very difficult claim to make out under New York State law, and it does require appeal to the Public Health Council in most cases. There were no allegations that such an appeal was taken.

JUDGE MINER: You mean to tell me that you cannot assert a claim against a hospital, a physician cannot assert a claim for failure to comply with the bylaws in connection with his dismissal, unless he has first exhausted some administrative remedy?

MS. FISHER: Yes, Your Honor, in most cases, that is true.

JUDGE PRATT: That might be a good reason not to exercise pendant jurisdiction, and discretion and remand it to the state court, or let state court proceedings proceed, but go ahead.

MS. FISHER: Okay. On the question of sanctions in this

case, Rule 11 is, of course, to discourage abuses of the legal system. Doctor Hodge has abused the legal system in my opinion in this case. Particularly what started the question of sanctions was his cross motion for summary judgment, which he said he made as a cross motion to the motion to dismiss that was made by the Defendants, based on the fact that the Defendants' papers said that for purposes of a motion to dismiss, all of the allegations made by the Plaintiff have to be taken as true.

Well, yes, that is the case, but then Doctor Hodge turned around and said -- and he was at that point represented by counsel also, he turned around and said, well then, that means that I should win a motion for summary judgment because they have admitted that everything is true. Even if we had admitted that everything was true, Your Honor, according to Judge Curtin's opinion of the record, he still had not come up -- alleged enough to show a colorable claim of discrimination, but in any event, that is not the rule, that is not the intent of that statement.

Under the Eastway case, this was not a good faith argument for the extension of law, and Doctor Hodge then proceeded with an interlocutory appeal here against the advice of the clerk, and against the relatively clear meaning of Judge Curtin's order. We have had to --

JUDGE MINER: Well, rather than arguing sanctions, maybe we ought to talk a little bit about the merits of the claim against your client. Your client employed Doctor Hodge, is that right?

MR. SMITH: That's correct, your Honor.

JUDGE MINER: Your client is charged with acting with some of the other Defendants to interfere with the contractual relations or -- not the contractual relations necessarily, but the right of Doctor Hodge to be employed in the emergency room. Is that some kind of a claim against your client?

MS. FISHER: You mean if he attempts to state that claim

against my client?

JUDGE MINER: Yes.

MS. FISHER: Yes, I believe he has. He cannot claim against my client a violation of bylaws, because my client was not the hospital.

JUDGE MINER: He certainly can claim breach of contract against your client.

MS. FISHER: He could, but I don't see that he has stated that anywhere, Your Honor.

JUDGE PRATT: Thank you, Ms. Fisher. Thank you all. We will reserve decision. Doctor Hodge, you will be notified of the result of our decision.

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I hereby state that the foregoing is a true and accurate transcript of the minutes of this hearing, to the best of my ability.

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NEIL M. SEFF - Hearing Reporter

(2)

No. 91-443

In The

Supreme Court of the United States

October Term, 1991

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKESHORE HOSPITAL, INC., STAT SERVICES INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOSEPH G. CARDAMONE, M.D. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the dismissal of a Complaint brought under 42 U.S.C. § 1981 where it wholly fails to allege a racially discriminatory motive for removing or dropping a physician's name from an Emergency Room Physician's Roster, and instead, merely sets forth disputes concerning that physician's lack of appropriate medical judgment.

2. Whether a claim under § 1981 of the Civil Rights Act is properly dismissed where the alleged discriminatory conduct involves, in essence, a termination from employment, and not the formation of a new contract.

3. Whether a defendant-doctor, not employed by the hospital, who was not personally involved in the decision to drop another doctor from an Emergency Room Physician's Roster, may be held liable for that decision under 42 U.S.C. § 1981.

4. Whether the Court of Appeals properly affirmed the dismissal of claims arising under 42 U.S.C. §§ 1985 and 1986, absent any evidence of state action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL R. HODGE, M.D.,

Petitioner,

-vs-

LAKESHORE HOSPITAL, INC.,
STAT SERVICES INC.,
JOSEPH G. CARDAMONE, M.D.,
LYNN FELDMAN, D.O.,
JAMES B. FOSTER, C.E.O.

Respondents.

BRIEF FOR RESPONDENT JOSEPH G. CARDAMONE IN OPPOSITION

Joseph G. Cardamone, M.D. respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the Second Circuit's decision affirming without opinion the decision of the District Court in this case.

STATUTES INVOLVED

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985

. . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . .

COUNTERSTATEMENT OF THE CASE

Petitioner Daniel Hodge, a black physician, commenced this action on June 4, 1987, alleging that respondents Stat

Services, Inc. ("Stat Services"), Lake Shore Hospital ("Lake Shore"), Joseph G. Cardamone, M.D. ("Dr. Cardamone"), Lynn Feldman, D.O. ("Feldman"), and James B. Foster, C.E.O. ("Foster") had violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 by dropping him from the Emergency Room Physician's Roster at Lakeshore. (AP. 9).[1/]

On August 3, 1987, Lake Shore and Dr. Foster moved to dismiss the Complaint for failure to allege facts showing disparate treatment or racially discriminatory motives, under 42 U.S.C. § 1981, and for his failure to state a

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1/ References to the Petitioner's Appendix to the petition are "AP. [page number]." References to the Appendix to the Second Circuit are "A. [page number]."

conspiracy cause of action under 42 U.S.C. §§ 1985 or 1986. (A. 39).

On August 10, 1987, Dr. Cardamone moved for partial summary judgment, or in the alternative, to dismiss the Complaint, essentially because: (a) Dr. Cardamone could not be liable under § 1981 because he had no personal involvement in the allegedly discriminatory decision to drop petitioner from the Emergency Room Physician's Roster; (b) petitioner failed to properly plead discriminatory motive, a prerequisite for liability under 42 U.S.C. § 1981; and (c) the § 1985 and § 1986 claims must fail for lack of the requisite state action. (A. 56, 63-81).

Petitioner cross-moved for summary judgment. (A. 84). Stat Services, and Feldman, having also moved to dismiss the Complaint (A.x), opposed petitioner's

cross-motion and requested attorneys' fees pursuant to Rule 11 of the Federal Rules of Civil Procedure ("FRCP"). (A. 163-169). Similarly, Lake Shore and Foster opposed the cross-motion and sought sanctions, pursuant to Rule 11. (A. 229). Dr. Cardamone opposed the cross-motion, but did not move for Rule 11 sanctions. (A. 219-226).

The District Court entered an Order, dated February 4, 1988, dismissing the Complaint in its entirety, denying petitioner's cross-motion for summary judgment and awarding costs and reasonable attorneys' fees, pursuant to Rule 11, in favor of all respondents (AP. 9-16).

In its decision, the District Court determined that petitioner merely described a history of disputes with respondents regarding his medical treatment of patients and made only conclusory allegations of

racial discrimination. The court then dismissed the claims under 42 U.S.C. § 1981 (AP. 14). The court also dismissed the §§ 1985 and 1986 claims because the necessary allegations of state action were lacking. (AP. 14). While the District Court granted costs and attorneys' fees under Rule 11, it withheld entry of the judgment until the question of the amount of the attorneys' fees could be decided. (A. vi). The court did not reach the issue, raised by Dr. Cardamone, that his lack of personal involvement in the decision to drop petitioner's name from the Emergency Room Physician's Roster warranted summary judgment dismissing the Complaint.

Thereafter, on February 17, 1988, the court ordered respondents to submit detailed affidavits in support of their applications for attorneys' fees. (AP. 17). On

February 19, 1988, petitioner appealed from the February 4, 1988 Order. (A. 242).

On April 20, 1988, the United States Court of Appeals for the Second Circuit issued a mandate dismissing the appeal, with sanctions, including double attorneys' fees. (AP. 8). In the meanwhile, counsel for all respondents submitted affidavits seeking attorneys' fees, as ordered by the court. (AP. 4-5). Petitioner opposed the application and requested that the court recuse itself "due to its conflicts of interest as a self-appointed medical expert witness for the defendants." (AP. 5). The District Court denied the application for recusal. (AP. 5). Stat Services and Dr. Feldman filed an affidavit seeking an award of attorneys' fees incurred in dismissing the appeal. (AP. 5). The District Court, by Order dated December,

1990 and by Judgment, dated December 21, 1990, awarded sanctions against petitioner in the sum of $2,000 ($500 to be paid to each of respondents' respective counsel). (AP. 4-6). Petitioner appealed, by Notice of Appeal dated January 4, 1991. (A. iv).

Oral argument was heard on May 9, 1991. (AP. 21-34). The Second Circuit entered an Order on May 15, 1991 affirming, without opinion, the District Court's judgment of December 21, 1990, and the interlocutory orders of February 4, 1988 and February 17, 1988 on which the final judgment was based in part for substantially the reasons set forth in Judge Curtin's opinions and orders. (AP. 1-2). The decisions of the District Court and the Second Circuit were all unpublished. Petitioner served his Petition for Writ of Certiorari to the

United States Court of Appeals for the Second Circuit on August 10, 1991.

STATEMENT OF THE FACTS

Petitioner Daniel Hodge, a black physician, was employed by Stat Services, which had contracted with Lake Shore to provide the hospital with emergency room services. Petitioner was granted temporary work privileges at Lake Shore in 1986, and he was reappointed for 1987 to 1988. (A. 230; A.5 ¶ 2). In January of 1987, petitioner was dropped from Lake Shore's Emergency Room Physician's Roster, and thereafter no longer scheduled to work. (A. ¶ 6).

As the District Court properly determined, this action was taken as a result of petitioner's questionable methods

of "medical treatment," which created disputes between him and respondents. (A. 234). The disputes concern numerous incidents of petitioner's callous attitude towards and/or improper treatment of patients. As the District Court noted, petitioner's own affidavit submitted on the motion, detailed, for more than 20 pages, the history of these disputes with respondents concerning his medical treatment decisions in the emergency room. (A. 232-234; 12-37).

Petitioner described, for example, treating an asthmatic woman whom he claimed was merely "overbreathing," as primarily hysterical. Petitioner also attested to numerous other incidents and disagreements over the proper method of dealing with patients, and he described these differences

of opinions in great detail in his affidavit. (A. 232-234).

As the court below found, notably absent from the Complaint or the affidavit submitted by petitioner was any evidence of discriminatory motivation for the differing opinion. (AP. 13-14). The District Court then properly concluded that all of the disputes clearly originated from serious differences about proper medical treatment, and not from racial discrimination. (AP. 13-14).

It is undisputed that Dr. Cardamone is not now, and never has been, an employee of Stat Services or Lake Shore. (A. 59, ¶ 3). He is a private physician in Dunkirk, New York, who merely has staff privileges at Lake Shore and voluntarily served as Chair of its Emergency Room Committee ("ERC") during the calendar year 1986. (A. 59,

¶ 6). After that time, he had no role or participation in the ERC's actions (A. 59, ¶ 6).

The ERC itself has no role in staffing decisions or scheduling of work in Lake Shore's Emergency Room ("ER"). (A. 64, ¶¶ 8-9). Its role is as a quality assurance committee, and in that capacity, the ERC reviews complaints about staff services and procedures. (A. 60, ¶ 8). Dr. Cardamone requested that the ERC evaluate petitioner's treatment of a patient with a nearly severed toe. because he deemed it to be very inadequate. (A. 141). In a December 2, 1986 letter he solicited Dr. Hodge's comments. (A. 144). This was the last action taken by Dr. Cardamone in connection with plaintiff and the ERC (A. 61). He did not make the decision to drop petitioner from the Emergency Room Physician's Roster.

In January 1987, petitioner was dropped from the Emergency Room Physician's Roster, and thereafter, was not scheduled to work. (A. 43).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the lower courts' decisions were based upon the well settled law of this Court and of the United States Courts of Appeals. This Court has held that to prevail under 42 U.S.C. § 1981, a plaintiff must prove purposeful discrimination. Patterson v. McLean Credit Union, 491 U.S. 164, (1989). The lower courts properly determined that petitioner failed to set forth any facts demonstrating the existence of a discriminatory motive for dropping him from the Emergency Room

Physician's Roster. The record below clearly shows that the decision to remove petitioner from the roster was made because of differences regarding methods of medical treatment.

The Petition should also be denied because a decision of this Court subsequent to the District Court's decision removes any doubt that the Complaint fails to state a claim under 42 U.S.C. § 1981. In Patterson v. McLean Credit Union, 491 U.S. 164, (1989), this Court held that 42 U.S.C. § 1981 protects only the right to make contracts and the right to enforce contracts, and does not extend to post-contract formation conduct. The circuit courts have uniformly held that an alleged discriminatory termination of a contract is not actionable under § 1981 because it involves neither the making nor

the enforcement of a contract. Petitioner's allegations relate only to the termination of his contract and therefore fail to state a claim under § 1981.

Yet another reason for denial of the Petition with respect to Dr. Cardamone is that Dr. Cardamone was not personally involved in the allegedly discriminatory decision. The courts have held that to be liable under § 1981, a defendant must be shown to have been directly and personally involved in a deprivation of a plaintiff's rights. This means that an individual defendant must participate in, authorize or direct the discriminatory conduct. The filing of a complaint or report which triggers an investigation does not implicate the person who filed the complaint. Dr. Cardamone had no control over the scheduling

of physicians to staff the emergency room and therefore cannot be liable under § 1981.

The lower courts also properly determined that petitioner's § 1985 and § 1986 claims must fail for lack of the requisite state action.

The District Court's decision was fully consistent with the law of the circuits and of this Court. It did not depart from the accepted course of judicial proceedings and does not call for an exercise of this Court's power of supervision. Therefore, respondent Joseph G. Cardamone, M.D., respectfully requests that the Petition for a Writ of Certiorari be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

POINT I

THE LOWER COURT'S DISMISSAL OF THE § 1981 CLAIM BECAUSE PETITIONER FAILED TO PLEAD FACTS ALLEGING PURPOSEFUL DISCRIMINATION WAS BASED UPON THE WELL SETTLED LAW OF THIS COURT

Under well-established law, to constitute a violation of 42 U.S.C. § 1981, there must be intentional racial discrimination and a refusal "to extend to a negro, solely because he is a negro, the same opportunity to enter into contracts as he extends "to similarly situated white people." General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). To prevail, a plaintiff, including petitioner, must prove purposeful discrimination. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Liability will not attach in the absence of intentional racial discrimination. General Building Contractors Ass'n v. Pennsylvania, 458 U.S. at 391. See also, Guardians Ass'n of New York City Police Department, Inc. v. Civil Service Commission, 633 F.2d 232, 267 (2d Cir. 1980), aff'd on other grounds, 463 U.S. 582. The essence of the discrimination claim is that a plaintiff received "dissimilar treatment" from similarly situated white persons. Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).

The lower courts correctly determined this issue in the case consistent with this long and unbroken line of precedent. Petitioner failed to set forth any facts demonstrating the existence of a discriminatory motive for dropping him from

the Emergency Room Physician's Roster. (AP. 10-11). While petitioner's Complaint, motion papers and brief are littered with wild, conclusory accusations of racial discrimination, petitioner attests only to the fact that his form of medical treatment as an "independent professional" (Petition, p. 24) differs vastly from, and is superior to, respondents'. (A. 14-37).

Whatever differences in methods of medical treatment the parties may have, they do not raise or implicate any important federal question. Rather, as the courts below properly determined, they establish that petitioner was dropped from the Emergency Room Physician's Roster, not because he is black, but because he has continuously treated patients in a manner with which respondents disagree. (AP. 13). As properly determined by the District

Court, petitioner's claims arise from "non-racial reasons for his dismissal." (AP. 13-14) (citing Armstead v. Town of Harrison, 579 F. Supp. 777, 781 (S.D.N.Y. 1984)).

Petitioner's bare conclusory allegations of racial discrimination do not state a claim under § 1981. (AP. 13). "Racial motive, 'in the air, so to speak will not do.'" Armstead v. Town of Harrison, 579 F. Supp. at 781 (granting motions to dismiss and for summary judgment on §§ 1981 and 1983 claims arising from prosecution for trespass). Petitioner's reliance on so-called "documentary" evidence (Petition, pp. 19-20) is misplaced. That Lake Shore Hospital sent petitioner a letter initially renewing his privileges was not binding, and the Hospital could subsequently decide to withdraw those privileges based upon a review of petitioner's treatment of patients.

That the decision below does not raise any important federal questions is further demonstrated by the fact that petitioner fails to allege facts showing disparate treatment of similarly situated white physicians which is a crucial element of a § 1981 claim. Long v. Ford Motor Co., supra, 496 F.2d at 500; German v. Killeen, 495 F. Supp. 822, 827 (E.D. Mich. 1980). "To invoke the protection of § 1981, plaintiff must establish that defendants placed more stringent requirements on him because of his race; or that he was unable to make or enforce a contract that a white person could make or enforce; or that he was suspended because of dissimilar treatment caused in part by his race." German v. Killeen, 495 F. Supp. at 827. Furthermore, "these allegations should be supported by reference to specific acts, practices or

policies which resulted in the discrimination complained of." Id.

The courts have not hesitated to dismiss complaints containing insufficient allegations of disparate treatment. See Long v. Ford Motor Co., supra, 496 F.2d at 500; German v. Killeen, supra, 495 F. Supp. at 822; Young v. Skaggs Drug Centers, Inc. 487 F. Supp. 1184 (E.D. Ark. 1980).

The lower courts' decisions of this case do not depart from this accepted course of judicial proceedings. The Complaint and motion papers submitted by petitioner illustrate a long history of disputes between petitioner and the patients he treated as well as the staff. Petitioner did not submit any facts establishing a difference in treatment of white physicians with the same history or incidents of dispute. Petitioner raised this issue below

only in his unsworn memorandum of law in support of his cross-motion for summary judgment where he did no more than make conclusory allegations that respondents treated three white physicians differently than plaintiff by affording them procedural "due process." (A. 116). Petitioner presented no evidence, as was required by Rule 56, FRCP, of these allegations and did not name the three physicians.

Petitioner, who was then represented by counsel, cross-moved for summary judgment and submitted an affidavit which went beyond the allegations in his Complaint. Respondents, too, submitted affidavits to the District Court before it rendered its Order dismissing the Complaint. Therefore, the District Court properly could, and did, grant summary judgment in this case. FRCP 56.

Although he identified, in his Brief to the Second Circuit, the name of one white physician allegedly treated differently, such unsworn statement is not proof. Petitioner's similar belated statements in his Petition to this Court (Petition, p. 28) are also insufficient to warrant the granting of Certiorari.

The District Court's decision was consistent with the well settled law of this Court. The decision and its affirmance by the Second Circuit Court of Appeals does not conflict with decisions of other courts of appeal, nor is it a departure from the usual course of judicial proceedings.

POINT II

A DECISION OF THIS COURT SUBSEQUENT TO THE DISTRICT COURT'S DECISION REMOVES ANY DOUBT THAT THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF 42 U.S.C § 1981 BECAUSE IT INVOLVES ONLY POST CONTRACT FORMATION CONDUCT.

Yet another basis for denial of the Petition for Certiorari arises as a result of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In that case, which was decided after the District Court's decision below,[2/] this Court held that 42 U.S.C.

2/ The circuit courts have recognized that this Court's decision in Patterson v. McLean, applies retroactively as a federal court generally applies the law in effect at the time it renders its decision. Gonzalez v. Home Insurance Co., 909 F.2d 716, 723 (2d Cir. 1990); Lavender v. V&B Transmissions & Auto Repair, 897 F.2d 805, 806-07 (5th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, 899 F.2d 845, 849 (9th Cir. 1990).

§ 1981 protects only the right to make contracts and the right to enforce contracts. Id. at 491 U.S. 176. It does not extend to post-contract formation conduct.

The allegations contained in the Complaint concern respondents' alleged conduct after the formation of a contract of employment with petitioner, as a physician with Stat Services working at Lake Shore. The decision to drop petitioner from the Emergency Room Physician's Roster, and thus not schedule him to work, was in effect a termination.

The circuit courts have uniformly held that "an allegedly discriminatory termination of a contract is not actionable under § 1981" because it "involves neither the making nor the enforcement of a contract . . ." Patterson v. Intercoast Management

of Hartford, Inc., 918 F.2d 12, 14 (2d Cir. 1990) cert. denied, _____ U.S. _____, 111 S. Ct. 1686 (1991); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991); Gonzalez v. Home Insurance Co., 909 F.2d 716, 722 (2d Cir. 1990); Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-8 (5th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Prather v. Dayton Power & Light Co., 918 F.2d 1255, 1257 (6th Cir. 1990), cert. denied, _____ U.S. _____, 111 S. Ct. 2889 (1991).[3/]

Thus, petitioner's allegation that the respondents dropped him from the Emergency Room Physician's Roster fails to state a

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3/ Only the Eighth Circuit has held that Patterson does not bar such relief, and a panel of that Circuit has recently criticized this holding. Taggert v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) (criticizing Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990)).

claim upon which relief can be granted under 42 U.S.C. § 1981. The lower courts' decisions are consistent with this established law of this Court and the decisions of other courts of appeals and do not justify the granting of Certiorari.

POINT III

DR. CARDAMONE WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE HE WAS NOT PERSONALLY INVOLVED IN THE ALLEGEDLY DISCRIMINATORY DECISION

The Petition with respect to Dr. Cardamone should be denied for yet another reason. To be held liable under 42 U.S.C. § 1981 for discrimination in the making and enforcement of contracts, a defendant must be shown to have been directly and personally involved in a deprivation of a plaintiff's rights. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986), aff'd on other

grounds, 481 U.S. 604 (1987); Cain v. Chicago, 619 F. Supp. 1228, 1233 (N.D. Ill. 1985) (even under theory of respondent superior, defendant cannot be held liable under § 1981 absent his direct participation in the acts of discrimination); Howard v. Topeka-Shawnee County Metropolitan Planning Commission, 578 F. Supp. 534, 538, 541 (D. Kan. 1983) (granting summary judgment to commissioner who did not recommend or participate in personnel decision, but only received a notice of proposed termination).

Personal and direct involvement means that an individual defendant must participate in, authorize or direct the discriminatory conduct. Al-Khazraji v. Saint Francis College, supra, 784 F.2d at 518.

The filing of a complaint or report which triggers a disciplinary investigation does not implicate the person who filed the complaint in subsequent civil rights violations and does not constitute the personal involvement necessary to sustain liability for a § 1981 action. Williams v. Smith, 781 F.2d 319, 324 (2d Cir. 1986)[4/]; Sommer v. Dixon, 709 F.2d 173, 174-75 (2d Cir.), cert. denied, 464 U.S. 857 (1983) (granting summary judgment to prison guards who filed Inmate Misbehavior Reports that triggered investigations and hearings, but did not participate in investigation or attend hearing). These cases are

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4/ In Williams v. Smith, the Second Circuit affirmed in relevant part the decision of Judge Curtin. Significantly, part of Judge Curtin's reason for granting summary judgment to the individual defendants was that they did not "personally know, acquiesce or participate in any deprivation of plaintiff's constitutional rights."

indistinguishable from the instant case, and hence, the lower court's decision with respect to Dr. Cardamone is not in conflict with other courts.

The basis of petitioner's Complaint is that respondents have refused to schedule him to work in the emergency room. Because Dr. Cardamone had no control over the scheduling of physicians to staff that emergency room he cannot be liable under § 1981 for this alleged deprivation.

Dr. Cardamone did not participate in, authorize or direct any decision regarding petitioner's emergency room schedule. To the contrary, he did not even discuss these matters with anyone; he had no involvement whatsoever. (A. 58-62).

The only alleged act of involvement is a complaint Dr. Cardamone sent to the ERC questioning the adequacy of petitioner's

choice of medical treatment for one patient. This action does not subject him to § 1981 liability. See Williams v. Smith, supra, 781 F.2d 324; Sommer v. Dixon, supra, 709 F.2d 174-5.

Even if Dr. Cardamone's singular complaint prompted the Stat Services or Lake Shore to reconsider whether or not to schedule plaintiff in the ER, absent Dr. Cardamone's personal involvement in the decision-making process itself, he cannot be liable.

Moreover, petitioner's broad allegations of conspiracy do not cure this fatal defect. A conspiracy allegation in itself cannot establish personal involvement beyond what is alleged elsewhere in the complaint. Trotter v. Chicago, 573 F. Supp. 1269, 1275 (N.D. Ill. 1983) (granting mayor's motion to

dismiss §§ 1981 and 1985(3) claims relating to alleged police brutality); see also Sommer v. Dixon, supra, 709 F.2d at 174 (allegation that defendants conspired to file complaints to set in motion a series of acts by others that they knew would result in civil rights injury, is too conclusory and vague to withstand motion to dismiss). Since petitioner failed to allege an act of personal involvement in the scheduling decision itself, and since Dr. Cardamone did not engage in such an act, Dr. Cardamone cannot be held liable under § 1981.

Summary judgment is appropriate, where, viewing all facts most favorable to the opposing party, there is no genuine issue of material fact. Rule 56 FRCP; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some alleged factual dispute will not defeat a motion for summary

judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Summary judgment was appropriate in this case because petitioner raised no material issue regarding Dr. Cardamone's personal involvement in the decision to drop petitioner's name from the Emergency Room Physician's Roster.

POINT IV

THE 42 U.S.C. § 1985 AND § 1986 CLAIMS MUST FAIL AS THERE IS NO STATE ACTION

As determined properly by the District Court, petitioner's § 1985 and § 1986 claims must fail for lack of the requisite state action. (See AP. 14 and cases cited therein).

POINT V

THE DISTRICT COURT'S DECISION DOES NOT WARRANT AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court's decision fully comports with the law of the circuits and of this Court. Petitioner, however, repeatedly complains about the delay between the District Court's decision on the merits and the assessment of sanctions, which delayed his ability to appeal. To begin with, the lower court did not violate any statute or rule. Secondly, petitioner was free to move or otherwise request that the court reach a decision on the amount of sanctions. Further, petitioner was not materially prejudiced by the delay in assessing sanctions. He still had the right to appeal the decision. He was aware on the date he received the District Court's original

decision that the Court had ruled against him. Moreover, the lower court correctly applied the law to the facts of this case.

Nor did the District Court judge improperly appoint himself a medical expert, as petitioner claims. The Court simply recognized that there was a dispute concerning appropriate medical treatment between the parties, which dispute led to petitioner's being dropped from the Emergency Room Physician's Roster. The court did not resolve the merits of the medical arguments or become its own medical expert in this regard. (AP. 12-13).

Finally, because the federal claims were properly dismissed and because they were not developed by plaintiff in his complaint or on the motion, petitioner's state law claims were properly dismissed by the courts, in their discretion.

Accordingly, petitioner lacks a viable basis for petitioning for Certiorari. This Court is not the proper forum to address petitioner's concern's regarding a particular judge or judges.

CONCLUSION

For the reasons discussed above, respondent Joseph G. Cardamone, M.D. respectfully requests that petitioner's request for Certiorari be denied.

Dated: October 11, 1991

Respectfully submitted,

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(3)

No. 91-443

IN THE

Supreme Court of the United States

October Term, 1991

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKE SHORE HOSPITAL, INC., STAT SERVICES, INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LAKE SHORE HOSPITAL, INC. AND JAMES B. FOSTER, C.E.O.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the dismissal of petitioner's claim based on 42 U.S.C. §1981 because petitioner was unable to produce any evidence of racially discriminatory intent?

2. Whether the Court of Appeals properly upheld the dismissal of petitioner's claim under 42 U.S.C. §1981 because the alleged discriminatory conduct involved an alleged termination of employment and not the formation of a contract?

3. Whether the Court of Appeals properly affirmed the dismissal of petitioner's claims based on 42 U.S.C. §§1985 and 1986 because the petitioner was unable to produce any evidence of racial or class-based animus and could not show any state action as required to support a claim for violation of the fourteenth amendment to the United States Constitution?

4. Whether the Court of Appeals properly affirmed the District Court award of sanctions against the petitioner based on the petitioner's violation of Rule 11 of the Federal Rules of Civil Procedure?

STATEMENT PURSUANT TO RULE 29.1

Lake Shore Hospital's subsidiary is LSP, Inc.

TABLE OF CONTENTS.

Page

TABLE OF AUTHORITIES.

CASES

STATUTES AND CONSTITUTIONAL AMENDMENTS

Page

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CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

(For the sake of brevity, Foster and Lake Shore only set forth the text of those provisions not set forth completely in the petition.)

United States Constitution, Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

United States Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that

they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on Section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rules 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of Section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time or after the dismissal of the claim under subsection (a), shall

be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42 U.S.C. §1981

(Full text set forth in petition.)

42 U.S.C. §1985(3)

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or

deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

42 U.S.C. §1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Federal Rules of Civil Procedure, Rule 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or

accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Federal Rules of Civil Procedure, Rules 56(a), (c)

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Respondents Lake Shore Hospital, Inc. ("Lake Shore") and James B. Foster, C.E.O. ("Foster") join in and adopt the "Counterstatement of the Case" and "Statement of the Facts" presented in the brief in opposition submitted by respondent Joseph G. Cardamone, M.D.[1]

In addition, Lake Shore and Foster join in, support and adopt the arguments presented in respondent Dr. Cardamone's brief under Points I and II in regard to the first and second questions presented. Therefore, Lake Shore and Foster will not present any additional arguments on those issues.

[1] In supplement to Dr. Cardamone's "Counterstatement of the Case," it should be noted that the petitioner previously filed a petition for a writ of *certiorari* in regard to the April 20, 1988 decision of the Court of Appeals. That petition was summarily rejected or dismissed by this Court. In addition, although the present petition was filed on August 10, 1991, the office of the Clerk of this Court informed respondents that the petition was docketed on September 17, 1991 and that therefore respondents' time to file their briefs in opposition did not begin to run until that date.

SUMMARY OF REASONS FOR DENYING THE WRIT

The decisions below involved no unsettled legal issues. The case was decided by applying well settled law to the facts alleged by the petitioner. Therefore, the determination of the issues in this case has no impact upon any parties other than the litigants in this case.

A recovery under 42 U.S.C. §§1985(3) or 1986 requires a showing of racial or class-based animus. No such showing was made by the petitioner in this case.

Without a showing of a violation of some independently established right, the petitioner cannot recover under Sections 1985(3) or 1986. Because no discriminatory intent was present, the petitioner cannot show a violation of 42 U.S.C. §1981. Because no state action was present, the petitioner cannot show a violation of the fourteenth amendment to the United States Constitution. Therefore, the petitioner cannot recover under Section 1985(3) or Section 1986 for a conspiracy to violate either of those provisions.

The District Court was required to impose sanctions upon the petitioner pursuant to Rule 11 of the Federal Rules of Civil Procedure because the petitioner's motion for summary judgment was not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

The petition does not raise any issues of unsettled law. The District Court applied well settled law to the facts alleged by the petitioner and submitted by him in support of his own motion for summary judgment. The questions that the petitioner is asking this Court to review therefore have no impact on any parties other than the litigants in this action.

For the foregoing reasons, the writ should be denied.[2]

[2] As the Court of Appeals correctly noted in its decision, petitioner did not develop any claim based on state law at any point in this litigation. In fact, the issue of possible state law causes of action did not come up until raised by the Court at oral argument. Therefore, it is *not* an issue on this appeal.

REASONS FOR DENYING THE WRIT

POINT I

The Petitioner Is Unable To Allege Facts Sufficient To Support Claims Based On 42 U.S.C. §§1985 And 1986

A. Petitioner is Unable To Allege Racial Or Class-Based Animus.

The decisions of this Court make it clear that to recover under 42 U.S.C. Section 1985(3) a plaintiff must show a conspiracy based upon racial, or at least class-based animus. Because 42 U.S.C. Section 1986 requires a showing of a conspiracy in violation of Section 1985(3), (*see, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982); and *Rogin v. Bensalem Township*, 616 F.2d 680 (3rd Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981)), racial or class-based animus is also a necessary element of a Section 1986 claim. As the District Court correctly found, and as the Court of Appeals correctly affirmed, the petitioner was unable to make any showing of racial or class-based animus. The petitioner's claims based on Section 1985(3) and Section 1986 were, therefore, properly dismissed.

To recover under Section 1985(3), the petitioner was required to show (1) a conspiracy (2) to deprive him of equal protection by (3) causing an act in furtherance of the conspiracy to be performed which (4) deprived him of a constitutional right. *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*, 403 U.S. 88 (1970). In *Griffin*, however, this Court held that not every conspiracy violates Section 1985(3). "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously

discriminatory animus behind the conspirators' action." *Id.* at 102. This holding was reaffirmed by the Court in *United Brotherhood of Carpenters*, 463 U.S. at 325. The petitioner does not challenge this well-established principle. Instead, he is challenging only the District Court's application of the law to the specific facts alleged in this case. That application was based on petitioner's *own* motion for summary judgment, which clearly showed that the dispute between the petitioner and the respondents was based upon medical disagreements and not racial animus. The Court of Appeals affirmed the District Court's decision.

The petitioner's submissions were extremely lengthy and set forth in great detail the petitioner's view of the facts. There is no need for this Court to substitute its interpretation of those lengthy documents for that of the District Court, which interpretation the Court of Appeals affirmed. Because the question that the petitioner is asking this Court to decide is limited solely to the specific facts of this case, the petitioner has not pointed out any important legal issue requiring the Court's attention. This case, therefore, holds no potential impact for any parties other than the litigants in this case.

Because a decision by this Court in this case would provide no guidance to other courts or potential litigants and because there is no need to disturb a ruling by the District Court (affirmed by the Court of Appeals) that was based upon the petitioner's own submissions in support of his own motion for summary judgment, this Court should deny the writ.

B. Absent State Action or a Valid Claim Under Section 1981, Petitioner Cannot Recover Under Section 1985(3).

The lower courts in the instant action correctly held that the petitioner failed to show a violation of any right protected by Section 1985(3). Therefore, these courts properly dismissed the petitioner's claims under Section 1985(3) and Section 1986, and this Court should deny the writ.

"Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American Federal Savings & Loan Assoc. v. Novotny*, 442 U.S. 366, 372 (1979). Therefore, to recover under Section 1985(3), a plaintiff must show that some separately recognized right was violated by the alleged conspiracy. In this case, the petitioner alleged that his rights under 42 U.S.C. Section 1981 and the fourteenth amendment to the United States Constitution were violated.[3] As explained in the Brief in Opposition submitted by respondent Joseph G. Cardamone, M.D., the petitioner was unable to show intentional discrimination as required for recovery under Section 1981. Therefore, the petitioner could not recover under Section 1985(3) for a conspiracy to violate Section 1981.

The petitioner also cannot recover for a conspiracy to violate the fourteenth amendment. This Court, in *United Brotherhood of Carpenters*, 463 U.S. at 825, held that where a plaintiff alleges a conspiracy to violate a right that is by definition a right only against state

[3] At oral argument, the Court of Appeals questioned the respondents about the possibility of the petitioner recovering under Section 1985(3) for a conspiracy to violate the thirteenth amendment to United States Constitution. Although the petitioner has not raised the issue of the thirteenth amendment during the litigation of this case, no recovery is available to him under Section 1985(3) or Section 1986, based on the thirteenth amendment, for the reasons explained in Point I.A. above.

interference, such as the rights guaranteed by the fourteenth amendment, the plaintiff must show that the conspiracy contemplated state involvement. *Id.* at 832-833.

As the District Court correctly found, and the Court of Appeals correctly affirmed, the petitioner has made no allegations of state action. All of the respondents are purely private entities. The petitioner cannot, therefore, recover for any conspiracy allegedly designed to violate his fourteenth amendment rights. The requirement of state action for a violation of the fourteenth amendment is settled beyond any dispute. There is no need for this Court to re-examine that doctrine.

This case involves only a dispute over the application of well settled law to the specific facts of this case. That dispute was easily resolved by the District Court by reference to the petitioner's own submissions in support of his own motion for summary judgment. Therefore, review by this Court would provide no guidance for future disputes and would hold no impact for anyone other than the litigants involved. Because the petition raises no issues worthy of this Court's review, the writ should be denied.

POINT II

Rule 11 Required The District Court To Award Sanctions Against Petitioner

Rule 11 of the Federal Rules of Civil Procedure requires district courts to impose sanctions any time the rule is violated. According to Rule 11

> [t]he signature of an attorney or party constitutes a certificate that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation.
>
> *** If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction . . .

(Emphasis added.)

The imposition of a sanction is mandatory when the rule has been violated. *See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group*, _____ U.S. _____, 110 S.Ct. 456, 459 (1989). Further, a decision by a district court awarding sanctions will only be reversed if the district court abused its discretion. *Cooter & Gell v. Hartmarx Corp.*, _____ U.S. _____, 110 S.Ct. 2447 (1990).

The petitioner's motion for summary judgment, based upon the incredible argument that the respondents admitted all of the petitioner's allegations by recognizing that, for the purposes of a motion to dismiss, it was necessary to treat the allegations as true, was clearly not warranted by existing law or a good faith argument for extension, modification, or reversal of existing law. Therefore, the District Court did not abuse its discretion.

It is clear that the petitioner's *pro se* status did not relieve him of his duty to comply with Rule 11. The petitioner's motion for summary judgment was, in fact, signed by counsel, who withdrew from the case shortly thereafter. In addition, the District Court specifically found that the petitioner was the "main force in deciding how this case should be processed." (AP 6.) A party, represented or proceeding without assistance of counsel, must comply with the rule's requirements. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, _____ U.S. _____, 111 S.Ct. 922 (1991). Thus, even if the petitioner were not a law student, as he was at the time of the proceedings below, the District Court would have been required to impose sanctions against him.

Because the petitioner's summary judgment motion violated Rule 11, mandatory sanctions had to be imposed by the District Court. Therefore, this Court should deny the writ.

CONCLUSION

The decision of the District Court, which the Court of Appeals affirmed, turned only upon the facts of this case. No unsettled questions of law are implicated by the petition. As such, this case bears no impact for anyone other than the present litigants. Moreover, the decisions below were correct. For these reasons, the writ should be denied.

Dated: Buffalo, New York
October 17, 1991

Respectfully submitted,

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(4)

No. 91 - 443

In The

Supreme Court of the United States

October Term, 1991

DANIEL R. HODGE, M.D.,

Petitioner,

vs.

LAKE SHORE HOSPITAL, INC., STAT SERVICES, INC., JOSEPH G. CARDAMONE, M.D., LYNN FELDMAN, D.O., JAMES B. FOSTER, C.E.O.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO CARDAMONE'S BRIEF IN OPPOSITION

Daniel R. Hodge, M.D., J.D., *Pro Se*
64 Marine Drive
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October 24, 1991

QUESTIONS PRESENTED

1. Whether respondent Cardamone's proposed **"theory of innocence"** suffers from severe substantive, tangible, temporal, timing and spatial incongruences, in addition to being totally contrary and wholly inconsistent with his blanket admission?

2. Whether this Court must declare that **unlawful racial discriminatory intent** under 42 U.S.C 1981, 1985 (3) and 1986 can be proved by **documentary evidence** and that this reprehensible conduct by the respondents must be denounced and severely penalized?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY

Respondent Cardamone in his **Brief in Opposition** attempts to characterize his role in this grotesque and gruesome butchery of Petitioner's medical career, as being this distant, aloof, private physician from neighboring Dunkirk, New York, who merely has staff privileges at Lake Shore Hospital, in Irving, New York, and who voluntarily - as a community service - served as Chair of Lake Shore Hospital's Emergency Room Committee during the calendar year of 1986, and had no role in staffing decisions - since that's not the function of the Emergency Room Committee, says he - or scheduling of work in Lake Shore's Emergency Room, but functioned so nobly as a **"quality assurance"** sleuth, sniffing around in that capacity to **"review complaints about staff services and procedures."**

Indeed it was in this honored mien that Chair of Lake Shore's Emergency Room Committee, Cardamone, surreptitiously, according to Respondent Feldman (A 23, A referring to the page in the **Appendix for the Appellant** below) overheard Petitioner's conversation with the mother of the hysterical **asthmatic**[1]

Respondent Cardamone proclaims to the world that in his honored capacity as a **"quality assurance"** czar, he **"requested that the Emergency Room Committee evaluate Petitioner's treatment**

---

[1] Patient A, is the asthmatic in the so-called **statement of charges** of the department of health, office of professional medical conduct, brought against Petitioner on April 12, 1988, barely two months after ***Hodge vs. Lake Shore Hospital et al.,*** was dismissed be the district court on February 4, 1988. Patient A, who in no way would have been aware of the suit, was, as were others, induced in a conspiracy with Respondents Feldman, Cardamone and Foster, among others, to sign an affidavit alleging that she didn't give Petitioner permission to, **"reveal personally identifiable information obtained in a professional capacity without prior consent of the patient,"** purportedly within the meaning of 8 NYCRR 29.1 (a)(8), a rule of the education department.

The mere triviality of the charge, demonstrates the extent to which the Respondents would stoop to harm this Petitioner, for accidentally not **"whiting out"** Patient A's name in Petitioner's district court affidavit, even then, a totally harmless error, readily correctable pursuant to F.R.C.P. Rule 60 (a), which provides for the correction of clerical mistakes in judgments and **"other parts of the record . . . arising from oversight or omission."** No other persons, but the parties in the action, had been privy to that Patient A oversight, at the time the charge was made.

of a patient with a nearly severed toe, because he deemed it to be very inadequate." (That famous "from-himself-to-himself" request and conflict-of-interest-laden peer review process) That "deemed-very-inadequate" concern, even had it been so perceived by him at the time of the patient's admission September 25, 1986, was indeed an extremely isolated medical point of view, held by none others in the medical literature, and therefore most surely was a royal hoax according to the well-established medical principles of amputation and replantation surgery.

Respondent Cardamone's convoluted and contrary assertions, and the documentary evidence controverting those malicious and perjurious proclamations, presents Respondent Cardamone in his truest light as being a pernicious liar who cannot escape criminal, let alone civil liability for his conspiratorial misdeeds.

A-R-G-U-M-E-N-T

POINT I

Respondent Cardamone's Proposed "Theory Of Innocence" Suffers From Severe Substantive, Tangible, Temporal, Timing And Spatial Incongruences, In Addition To Being Totally Contrary And Wholly Inconsistent With His Blanket Admissions.

Respondent Cardamone's proposed "theory of innocence" suffers from severe substantive, tangible, temporal, timing and spatial incongruences, in addition to being totally contrary and wholly inconsistent with his blanket admissions, pursuant to his August 10, 1987, FRCP Rule 12 (b)(6) motion to dismiss. Those admissions were operatively described with particularity - in Petitioner's affidavit - sworn to on June 2, 1987, simultaneously dated and filed with the complaint.

According to the June 2, 1987 blanket admission version of the Cardamone "theory of innocence" the following paragon of profligacy is uncovered in paragraphs 66 and 67 (A 34):

66. Then, in a totally contrived scheme devised only after the plaintiff confronted defendant Dr. Feldman, about being dropped from the Emergency Room Physician's roster, in January 1987, the Emergency Room Committee sent the plaintiff

communications on February 27, 1987 and March 6, 1987 regarding the incident of alleged malpractice which presumably was the straw that broke the camel's back and was the "bona fide" reason the defendants dropped the plaintiff from the Emergency Room physician's roster in January 1987.

67. All this was "inadvertently not sent to the plaintiff" following the late November, 1986, Emergency Department meeting. But, the plaintiff was not "inadvertently dropped" from the Emergency Room physician's roster in January, 1987, because that illegal, racist and unwarranted act did not have Board approval although the Board cannot escape a negligence charge. The defendant, Mr. Foster, defendant Dr. Feldman and defendant Dr. Cardamone, had hoped that the plaintiff would get in the wind after the plaintiff was leaked the adverse review of the alleged malpractice regarding the toe through the grape vine."

Aside from the problem of illegal **"leaks,"** which was recently responsible for the disgraceful national theatrical farce, sponsored by the judiciary committee of the United States Senate, an admission is an admission, whether proffered or requested. Respondent Cardamone is being represented by reputedly very competent counsel. Respondent Cardamone, of course, had the option to deny a piece and admit a portion of Petitioner's complaint and particularizing adjunctive affidavit. Respondent Cardamone opted to admit them in their entirety, operative facts and all.

The reference and use of the term **"racist"** in the complaint and affidavit, is something most white people who, in fact are racist, seem to find so horribly offensive. Some murderers in Attica Prison are at times quite offended by references to them as murderers. In the instant case, the term racist referred to the fact that Petitioner very well knew from documented evidence that Dr. Gilbert, D.O., a white individual - and quite a congenial fellow - had been subjected by the Respondents to **"corrective action"** and could still work in Lake Shore Hospital's Emergency Room, because by definition **white-is-right**, no matter how inappropriate, indecorous or even atrocious the conduct in question. That's just a plain ole' fact-a-life and phenomenon-a-nature in the white world. If revealing those unfortunate facts makes most white people uncomfortable, well then that's just too bad. Every Black individual is humiliated daily by the chicanery

of white racism and learns to live with those harsh realities in America. It has to stop!

The **timing** of the proffered justification for the removal of Petitioner from the Emergency Room physician's roster and the **source** was the most damaging evidence to completely pin Respondent Cardamone into the collusive carousel of criminality, because the **"December 2, 1986 letter [in which] he solicited Dr. Hodge's comments,"** was actually a **fraudulent document** prepared after-the-fact when Petitioner insisted that the reason for the removal be **"put in writing."** And indeed it was, and, of course, it was then **"'inadvertently not sent to the Petitioner following the late November, 1986, Emergency Department meeting."**

Moreover, what - but guilt - could induce and cause Respondent Joseph G. Cardamone, M.D., to repeatedly make **totally false and perjurious statements** in his Affidavit (A 58-62), sworn to on August 10, 1987?

Respondent Cardamone alleged in paragraph 8, that, **"The Emergency Room Committee monitors and reviews the quality of services rendered in the Emergency Room, but *does not involve itself in personnel decisions*. . . . The Committee's function *is not to discipline individual physicians or nurses*, ..."** And in paragraph 9, that,

"The Emergency Room Committee *has no involvement* in these staffing decisions." And in paragraph 14, that, **"After I left, I did not expect the Emergency Room Committee to address any issues relating to Dr. Hodge's schedule at Lake Shore or any other hospital, as *this was not its function*, . "**

But the fact is that the **Emergency Room Committee** presently makes, will continue in the future to make, and has been making decisions about its **physician's roster** for years and in the example of - a terminated physician - Dr. Paul, even going way back to March 27, 1981, during which **Emergency Room Committee** meeting it was established and noted that,

"In review of E.R. Charts - letter from this Committee to Medical Records requesting Dr. Buran to *eliminate Dr. Paul from E.R. roster*. Agreement of all members. Letter to Medical Records requesting Dr. Buran to *eliminate Dr. Paul from resident staffings*. Letters to be submitted to Medical Administration Committee first."

The incident concerning the virtually amputated toe was the alleged **"malpractice"** which presumably was the straw that broke the camel's back and was the **"bona fide"** reason the Respondents dropped the Petitioner from the Emergency Room physician's roster on January 13, 1987.

In his September 24, 1986 Lake Shore Emergency Department Committee meeting, Chairman Respondent, Joseph G. Cardamone, M.D., notes - which goes to show that these even mediocre documentations are not at all benign - as **"unfinished business,"** that,

"Complaint referred to [Respondent, Lynn Feldman, D.O.], regarding [Petitioner Daniel Hodge] as well as additional complaint has been handled by counseling the physician. No further review required at this time. Performance of [Petitioner, Daniel Hodge] will continue to be monitored in the ER."

There were also, at that meeting, a couple of **"generic screens,"** which are euphemisms for nurses' **"whistle blowing reports"** about the **"bad things"** that physician, Daniel Hodge, was perceived, by a bunch of ill-educated nurses **[one of whom testified as a fact witness against Petitioner for the New York State department of health, office of professional medical conduct]** to have done wrong. It was noted in the September 24, 1986 Lake Shore Emergency Department Committee meeting report:

Problem:	**Daniel Hodge's attitude with patient in ER.**
Action:	**None required physician has been counseled.**
Problem:	**ER staff questioned patient care - delay in treatment by Daniel Hodge.**
Action:	**Delay in treatment considered inappropriate. Daniel Hodge's performance in the ER will be monitored. No further action required at this time.**

At the next Emergency Department Committee on November 21, 1986, Chairman Respondent, Joseph G. Cardamone, M.D., placed the 15 year-old **"incomplete"** amputation case on the agenda and mentions that famous, self-servingly malicious **"from-himself-to-himself,"** complaint letter:

"Letter from physician [Chairman Respondent, Joseph G. Cardamone, M.D.], regarding a 15 year old patient presenting in

ER, treatment by physician, [Daniel Hodge], and admitted by physician [Dr. Smith]. Physician [Chairman Respondent, Joseph G. Cardamone, M.D.], consulted and patient taken to surgery and repair of injury.

Discussion - Initial exam by physician reviewed. Extent of injury should have been recognized."

There was absolutely nothing of any great moment which transpired in that November 21, 1986 Emergency Department Committee meeting to explain, let alone warrant the precipitous action of dropping this Black Petitioner from the Emergency Room physician's roster, without the most basic of bylaw procedural protections, being granted to white physician, Dr. Gilbert and that was granted to white physician Dr. Paul, both of whom were considered by the Emergency Committee to be highly incompetent.

No where in any part of any record in the hospital or in this proceeding is there to be found **"an ad hoc committee report of a corrective action interview,"** with Petitioner, nor nowhere in any record anywhere is there evidence that the medical executive committee of Lake Shore Hospital appointed an ad hoc committee to conduct a preliminary interview with Petitioner, Daniel Hodge, which are the most fundamental of requirements of the Lake Shore Hospital bylaws which so routinely were applied to even white incompetent physicians. Lake Shore Hospital on the contrary considered Petitioner to be in that class of professionally competent physicians continuously meeting the hospital's qualifications, standards and requirements, and having the privilege of membership on the medical staff and emergency staff (A 189-200) to which Petitioner is entitled.

The president of the Lake Shore Hospital Board of Directors, Russell Newman, had written to the Petitioner on January 12, 1987, (A 135) announcing that on December 23, 1986, (A 134) Delmar Brinkman Chairman of the Board, had renewed the Petitioner, Daniel Hodge's Emergency department privileges. The letter stated in part,

"Your participation during 1985 and 1986 in the activities of the Medical Staff has contributed greatly to the success of Lake Shore Hospital. On behalf of the Board of Directors, I wish

to thank you and to inform you that the Board has approved your reappointment to the Medical Staff for 1987 and 1988 on the Emergency Services Staff.

Privileges are granted as specified in the delineation form which is attached for your information."

Respondent Cardamone seeks refuge in the ***Patterson vs. McLean Credit Union,*** 491 U.S. 164 (1989), decision of this Court which held that 42 U.S.C. 1981 protects only the **right to** <u>make</u> **contracts** and the **right to** <u>enforce</u> **contracts** and does not extend to **post-contract formation** conduct. Respondent Cardamone's reliance on ***Patterson,*** for exoneration from his woefully culpable, conspiratorial and despicably racist conduct, is, to say the least, ludicrous. Respondent Stat Services P.C., is the corporate physician Emergency Room staffing & scheduling, veil & vehicle, through which Respondent Feldman executes the wishes and directives of the Lake Shore Hospital Board. Neither Respondent Stat Services P.C., nor Respondent Feldman have any authority whatsoever to carry out any function contrary to the wishes of the Lake Shore Hospital Board, and most definitely not some **ridiculous ultra vires, chicanery** like dropping a physician from the Emergency Room physician's roster contrary to the expressed wishes and directives of the Lake Shore Hospital Board.

The limiting and determinate factor in the relational equation between the parties, <u>is the granting of privileges</u> by the Lake Shore Hospital Board, which as a practical matter, automatically resets the clock every two years and formally renews all instruments of implementation of the Lake Shore Hospital Board's directives including, of course, the formation of a new contractual agreement (See **Agreement** in the Appendix pages RP 1-3) - as has been the case since September 7, 1984 - between Petitioner and Stat Services P.C., which simply <u>has not been enforced</u> by the courts below. It is as simple as that!

The **operative facts** of Petitioner's contractual Agreement with Stat Services P.C., were that (1) the professional corporation hired Petitioner physician to provide professional services for the emergency department of the Lake Shore and Tri-County Memorial Hospitals **"according to a schedule to be**

established by mutual consent of the parties hereto;" that (2) Petitioner's relation to the professional corporation was, during the period or periods involved, one of **an independent contractor**; that (3) Petitioner was also even more importantly an **independent professional** over which Stat Services, P.C., **"shall neither have nor exercise any control or direction over the methods by which Physician performs his duties under this Agreement,"** and finally that (4), **"either party hereto may terminate this Agreement upon two weeks' written notice to the other party."**

Petitioner had established a schedule by mutual consent, was an independent contractor and independent professional who refused to allow the Respondents to neither have nor exercise any control or direction over the scientific methods by which Petitioner performed Petitioner's duties, regardless of the so-called **"public relations"** policies of the Lake Shore Hospital and Petitioner was terminated for reason that were blatantly malicious and racist, without any notice whatsoever and most surely contrary to the expressed wishes and directives of the Lake Shore Hospital Board. And yet an incompetent white doctor is allowed to work. It is a national disgrace!

These blatantly discriminatory acts were **intentional**, ***Domingo vs. New England Fish Co.,*** C.A. Wash. 1984, 727 F. 2d 1429 (1987), and **intent** may be proved by **circumstantial evidence,** such as a **pattern of conduct** unexplainable on grounds other than race. Petitioner emphatically asserts that the **unlawful discriminatory intent** of these Respondents most certainly can be proved from the **documentary evidence,** in this long paper trail of collusive culpability.

POINT II

This Court Must Declare That Unlawful Racial Discriminatory Intent Under 42 U.S.C 1981, 1985 (3) And 1986 Can Be Proved By Documentary Evidence And That This Reprehensible Conduct By The Respondents Must Be Denounced And Severely Penalized.

There is no doubt in the minds of reasonable people that the conduct perpetrated by the Respondent Cardamone and his

conspirators is wholly unacceptable in our system of health care and in the nation's work places and with regards to its work force. A hospital privilege is a most valuable intellectual property interest as is a good professional medical reputation, without which a physician's license is virtually useless.

Scientific analysis of the Petitioner's professional conduct - to the extent that this Court can reasonably appreciate and understand - has shown that Petitioner's professional acumen and skills are exemplary, and comport with **best evidence medical standards** found in textbooks, manuals, periodicals and journals. The so-called order of the New York State commissioner of education, calendar 10444, now also before this Court in ***Hodge vs. New York State Education Department et al.,*** 91-470, has similarly been demonstrated - to the extent that this Court may be able to appreciate and understand - to be wholly a scientific fraud having a purpose and motive insupportable under any medical or legal rationale.

The Respondents were deeply involved in the conspiracy with the New York State department of health, having provided 14 of the 20 so-called cases of professional medical misconduct in the totally bogus, **statement of charges.** Each and every one of those charges are false, fabricated and malicious, having nothing whatsoever to do with the bona fide practice of medicine or function of the peer review process as such review is performed by physicians of reputable professional character and good will.

Respondent Cardamone considers that, **"Petitioner's reliance on so-called 'documentary' evidence is misplaced. That Lake Shore Hospital sent petitioner a letter initially renewing his privileges was not binding, and the Hospital *could subsequently decide to withdraw those privileges* based upon a review of petitioner's treatment of patients."** Respondent Cardamone should - before proceeding in his harlequinade - first review the **established admissions** of his co-conspirator Respondent Foster, who (A 166-168) in his **Affidavit in Opposition** to the Petitioner's **Cross-Motion for Summary Judgment,** sworn to on September 10th, 1987, in paragraph 5, admitted that, **"No 'corrective action' has been requested, privileges restricted or membership on the medical staff affected by the hospital regarding Dr. Hodge."**

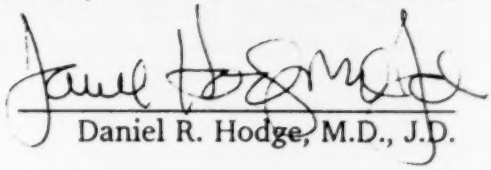
Respondent Cardamone proposes hypothetical suppositions, assumptions and probabilities of diversionary scenarios and circumstances having nothing to do with the horrific facts of this case. Respondent Cardamone's defensive arguments are similarly desultory, climbing from pilar to post seeking refuge in canned brief, circumlocutory fjords and exculpatory clauses, academic dissertations and nauseating legalese. This national disgrace couldn't be more sordidly simple: Two white doctors, having hospital privileges restricted or terminated, at the very least had the benefits of bylaw provisions however onerous their outcomes, but a Black physician, an exemplary, independent professional, object of jealousy and race hate, is dropped from the Emergency Room physician's roster, with not even as much as **notice,** let alone **an opportunity to be heard,** as the hospital bylaws mandate.

The Lake Shore Hospital Board, was informed that Respondents Cardamone, Feldman and Foster had in a blatant conspiracy violated the hospital's bylaws, and did absolutely nothing about correcting the matter and are therefore just as guilty as the perpetrators. 42 U.S.C. 1985(3), 1986. The courts below refused to perform a duty enjoined upon them by law: Enforce the directives of the Lake Shore Hospital Board pursuant to 42 U.S.C. 1981, 1985(3) and 1986. This Court must forcefully declare the rights of this Petitioner and make this severely damaged Petitioner whole again.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued.

Dated: Buffalo, N.Y.
October 24, 1991



Daniel R. Hodge, M.D., J.D.

AGREEMENT

This **AGREEMENT,** made and entered into this 7th day of September 1984, by and between STAT SERVICES, P.C., a New York Professional Corporation ("Corporation"), and Daniel R. Hodge, M.D. ("Physician").

WHEREAS, the Corporation is a professional service corporation that provides medical services through duly licensed physicians; and

WHEREAS, the Corporation has entered into an agreement whereby the Corporation will provide professional services for the emergency department of the LAKE SHORE HOSPITAL presently located at Rts. 5 & 20, Irving, New York, and TRI-COUNTY MEMORIAL HOSPITAL presently located at 100 Memorial Drive, Gowanda, New York, ("Hospitals"); and

WHEREAS, the Corporation deems it to be in its interest to secure the services of Physician to provide professional services for the emergency department of the Hospitals; and

WHEREAS, Physician has indicated his willingness to execute this Agreement with respect to the provision of such services upon terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein set forth, the Corporation and Physician agree as follows:

1. AGREEMENT OF SERVICES: The Corporation hereby hires Physician to provide professional services for the emergency department of the Hospitals **according to a schedule to be established by mutual consent of the parties hereto.**

2. RIGHTS AND OBLIGATIONS. It is the intention of the parties hereto that each physician hired by the Corporation shall devote substantially equal time and effort to the provision of professional services for the emergency department of the Hospital. It is agreed that the Physician or one of the other physicians hired by the Corporation will be on call at all times, **according to a schedule to be determined by the mutual consent of the parties hereto.**

3. COMPENSATION. The Corporation agrees to pay

the Physician $ 25.00 for each hour of emergency department coverage provided by Physician pursuant to this Agreement.

4. RELATIONSHIP BETWEEN PARTIES. Physician is retained by the Corporation only for purposes and to the extent set forth in this Agreement, and his relation to the Corporation shall, during the period or periods of his services hereunder, be that of **an independent contractor.** Physician shall be free to dispose of such portion of his entire time, energy and skill as he is not obligated to devote hereunder to the Corporation in such manner as he sees fit. Physician shall not have employee status or be entitled to participate in any plans, arrangements or distributions by the Corporation pertaining to or in connection with any pension, stock, bonus, profit-sharing, or similar benefits.

5. PROFESSIONAL RESPONSIBILITY. The Corporation **shall neither have nor exercise any control or direction over the methods by which Physician performs his duties under this Agreement.** Physicians shall perform such duties substantially in accordance with **accepted medical practices;** shall be a member of the Active Medical Staff or Emergency Services Staff of the Hospital; and shall comply with the Medical Staff Bylaws, Rules and Regulations and the policies of the Hospital.

6. LIABILITY INSURANCE. Physician shall maintain a minimum of $ 300,000/$ 900,000 malpractice insurance, which insurance shall be in full force and effect during the term of this Agreement.

7. TERMINATION OF AGREEMENT. If Physician resigns or is terminated as a member of the Active Medical Staff or Emergency Services Staff of the Hospital, this Agreement shall immediately terminate. Otherwise, **either party hereto may terminate this Agreement upon two weeks' written notice to the other party.**

8. ENTIRE AGREEMENT. This instrument contains the entire agreement of the parties relating to the subject matter hereof, and the parties hereto have made no agreement or representations relating to the subject matter of this Agreement which are not set forth therein. No modification of this Agreement shall be valid unless made in writing and signed by the parties hereto.

9. WAIVER. The waiver of a breach of any term or condition of this Agreement shall not be deemed to constitute the waiver of any other breach of the same or any other term or condition.

10. GOVERNING LAW. This Agreement shall be construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

STAT SERVICES, P.C.
By Lynn Feldman, D.O.

Daniel R. Hodge, M.D.
Employee